

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

532

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,796

JUNE BERNSTEIN, *et al.*,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

Under Seal of the Court of Appeals

FEB 24 1970

JOHN GEYER TAUSIG
708 Wire Building
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

Attorney for Appellants

(i)

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JURY
ACTION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 28 1967

JUNE BERNSTEIN and HERBERT
BERNSTEIN, her husband,
12 Garden Place
Jericho, L.I., New York,) ROBERT M. STEARNS, CLERK
Plaintiffs,)
vs.) Civil Action No. 464-67
THE UNITED STATES OF AMERICA,)
Defendant.)

COMPLAINT (FOR PERSONAL INJURY AND SPECIAL DAMAGES)

1. This Court has jurisdiction over this matter under the provisions of the Federal Tort Claims Act, 28 U.S.C.A. Sections 1346(b), 1402 and 2674.

2. The Plaintiffs are citizens of the United States and residents of the State of New York. The act or omission of the Defendant of which the Plaintiffs complain, and the resulting personal injury to the Plaintiff, June Bernstein, occurred in the District of Columbia on December 30, 1966. On that date, the Plaintiff, Herbert Bernstein, was the husband of the Plaintiff, June Bernstein, and he has continued to be her husband to the present time.

3. On December 30, 1966, at approximately 11:50 o'clock a.m., the Plaintiffs were invitees of the Defendant

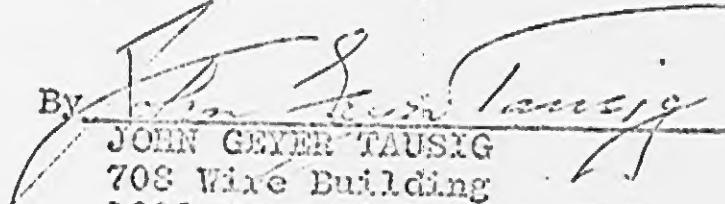
while visiting the Washington Monument in the District of Columbia. At that time a paved walkway leading from the Washington Monument to a nearby parking lot was in a dangerous condition, in that it was covered with snow and/or ice that had been formed into shapes that increased the danger to users of the walkway, beyond that caused by the original mere slipperiness of the snow and/or ice. The Defendant had knowledge of such aggravated dangerous condition, but nevertheless permitted the snow and/or ice to remain on the walkway in the aforementioned shapes for an unreasonable length of time. Said aggravated dangerous condition of the walkway caused the Plaintiff, June Bernstein, while walking thereon to lose her balance and fall. When she fell, the Plaintiff, June Bernstein, broke her ankle, which break has caused her and will continue to cause her pain and disability.

4. As a consequence of the above stated negligence of the Defendant and the resulting above stated injury to the Plaintiff, June Bernstein, her husband, the Plaintiff, Herbert Bernstein, has been required and will continue to be required to expend large sums of money for medicines, a wheel chair and crutches for his wife, and for hospital services and for professional services of physicians for his wife, and for the services of a maid to take care of his wife and their children. Also, as a further consequence of said negligence of the Defendant and the resulting injury to the Plaintiff, June Bernstein, the Plaintiff, Herbert Bernstein, has been deprived of his wife's consortium.

WHEREFORE, the Plaintiff, June Bernstein, demands judgment against the Defendant in the sum of Twenty Five Thousand Dollars (\$25,000) and costs, and the Plaintiff, Herbert Bernstein, demands judgment against the Defendant in the sum of Five Thousand Dollars (\$5,000) and costs, and interest from the date of the judgments at the statutory rate.

BUTLER, KOEHLER & TAUSIG

By


JOHN GEYER TAUSIG
708 Winc Building
1000 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorneys for Plaintiffs

[Caption Omitted in Printing]

A N S W E R

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint defendant avers:

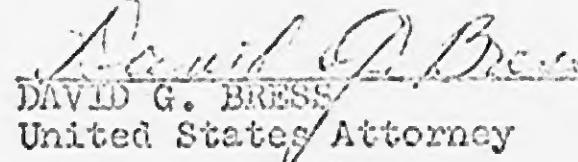
1. Defendant is not required to answer the jurisdictional allegations contained in paragraph 1.
2. 3. 4. Defendant denies each and every allegation of negligence and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraphs 2, 3 and 4.

Third Defense

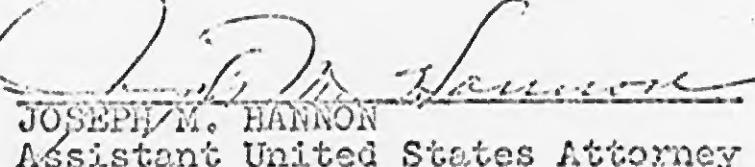
Defendant United States avers that if the female plaintiff fell as plaintiffs allege, her fall and the injuries resulting therefrom, if any, were caused by the sole or contributory negligence of the female plaintiff.

Fourth Defense

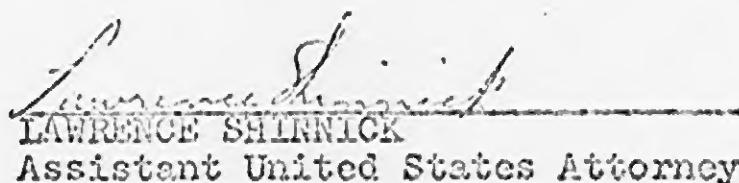
Defendant United States avers that if the female plaintiff was walking on a walkway covered with snow and ice as plaintiffs allege there were certain risks incident thereto, which were obvious and well known to the plaintiffs at all times, and whatever injuries, if any, plaintiffs received arose from and were caused by those risks thus assumed by the female plaintiff.



DAVID G. BRESS
United States Attorney



JOSEPH M. HANNON
Assistant United States Attorney



LAWRENCE SHIRNICK
Assistant United States Attorney

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

PRETRIAL PROCEEDINGS

* * *

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND
STIPULATE THERETO:

On Dec. 30, 1966, at about 11:45 a.m., the female P fell
on the grounds of the Washington Monument in the District of
Columbia, on a paved walkway leading to the parking area.

* * *

[Caption Omitted in Printing]

MEMORANDUM

The Court will deny the motion of the plaintiffs to use
the depositions of R.I. Good and W.F. Stevens as substantive
evidence under Rule 26(b), Para. 3(5) of the Federal Rules of
Civil Procedure.

It is the Court's view that the evidence adduced by
plaintiffs does not make a showing requisite for recovery under
the rules laid down in Smith v. District of Columbia, 89 U.S.
App. D.C. 7, 189 F.2d 671, 675 (1951). ^d 1/

The Court will find for the defendant.

1/ The same rules are applicable in similar suits against the
United States. Smith v. United States, 237 F.Supp. 675
(1965).

The attorney for the defendant is to submit proposed findings of fact and conclusions of law as well as a proposed order.

George H. Shultz, Marbles
JUDGE

June 12, 1969

[Caption Omitted in Printing]

MEMORANDUM GRANTING MOTION

On March 24, 1969, near the end of the trial herein, the attorney for plaintiffs made an oral motion to use the depositions or parts thereof of R.I. Good and W.F. Stevens as substantive evidence under Rule 26(d), Para. 3(5) of the Federal Rules of Civil Procedure. The Court took the motion under advisement, having granted the request of the attorney for defendant to file a memorandum in opposition. For a reason unconnected with the motion, the trial was continued until April 1, 1969.

When the trial reconvened on April 1, 1969 the Court had not received the opposition memorandum and had not ruled on the above-described motion. All other evidence in the case being in, the Court concluded the trial by hearing plaintiffs' counsel specify the parts of the mentioned depositions he proposed to put in the record as substantive evidence should his pending motion be granted; and at the same time the Court heard

any specific objection defendant's attorney had as to each such part, and ruled thereon, subject, however, to the determination to be made by the Court as to plaintiffs' motion to admit the depositions or parts thereof as substantive evidence.

As reflected in a memorandum of the Court filed herein June 12, 1969, the Court concluded to deny the plaintiffs above described motion of March 24, 1969. It has been brought to the Court's attention that there was confusion as to the disposition of this motion, the attorney for each side having understood from the proceedings on the last day of the trial that the Court had granted the motion.

Under the circumstances, and the case being a non-jury one, the Court has reconsidered, and has concluded to grant the motion of the attorney for plaintiffs to admit parts of said depositions as substantive evidence, said parts being shown in the April 1, 1964 transcript of the proceedings. Accordingly, the motion is granted. However, admission of such parts into the record as substantive evidence in no way changes the opinion of the Court that the plaintiffs have not made the showing requisite for recovery under the rules laid down in *Smith v. District of Columbia*, 89 U.S. App.D.C. 7, 189 F.2d 671, 675.

September 22nd, 1969.

Burke Shultz Wallace
SENIOR JUDGE

[Caption Omitted in Printing]

FINDINGS OF FACT
AND
CONCLUSION OF LAW

Findings of Fact

1. This action is brought against defendant United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), et seq.

2. The female plaintiff herein, June Bernstein, seeks damages for personal injuries sustained on December 30, 1966, as a result of a fall at the Washington Monument located in the District of Columbia. The male plaintiff, Herbert Bernstein, who is the husband of the female plaintiff, seeks to recover for loss of consortium, and for expenses incurred by him as a result of his wife's injuries.

3. The Washington Monument and its grounds are the property of the United States of America and are maintained by it.

4. Plaintiffs and their two minor children arrived in the District of Columbia on December 23, 1966, for a week's stay. During the week they visited various monuments and points of interest. On the morning of Friday, December 30, 1966, plaintiffs checked out of their motel to return to their home in New York, and en route from the city they stopped at the Washington Monument grounds. The memorial was open to the public

at that time. After parking their automobile in an adjoining parking lot known as the 16th Street, N.W. parking oval, plaintiffs proceeded along a paved walkway leading from the parking lot to the Monument. The female plaintiff testified that she noticed that the walkway was icy and cautioned her children to be careful. They visited inside the Monument for approximately 45 minutes.

5. After completing their view of the Monument plaintiffs and their children began to walk back to their automobile along the same walkway they used to approach the Monument. Plaintiff testified that she again called attention to the icy condition of the walkway to her husband and children who were walking ahead of her. She further testified that after walking halfway down she felt her "foot slipping out from underneath" her and that her "foot followed a ridge that the ice had formed," and her "body went the other way." The fall resulted in the fracturing of her left ankle.

6. There was a snowfall in the general Washington area on December 24, 1966 of 6.5 inches.

7. After the snowfall on December 24, all sidewalks and walkways in the Washington Monument area were cleared by a maintenance crew of the National Park Service. Sand and a calcium compound were then spread over the walkways. A maintenance

area of the National Park Service again cleared the area in question of snow and slush on December 28th during the late afternoon and distributed sand and a calcium compound over the entire length of the walkways at that time. ^{1/}

8. Due to fluctuating temperatures the snow which remained on the ground had melted to a total of 2 inches on December 29, the day before the accident. On December 29, a total of .20 inches of precipitation fell in the general Washington area.

9. During the evening of December 29, the temperature dropped below freezing and remained below freezing until approximately 10:00 o'clock a.m. the day of the accident. Also at this time a total of 2 inches of snow remained on the ground from the previous snowfalls.

10. Private Good, of the United States Park Police, whose beat on December 30 included the Washington Monument grounds, arrived at the parking oval around 10:30 o'clock a.m. ^{2/}

-
- 1/ The evidence established that Snow plan # 1 was in effect on December 28th, which plan gives 1st priority to vehicular traffic, 2nd priority to the White House area, 3rd priority to high pedestrian areas, and 4th priority to tourist attractions such as monuments, museums, and galleries.
 - 2/ The United States Park Police, who answer roll call at 6:45 o'clock a.m., proceed to their traffic posts and prepare for morning rush hour traffic. They do not get to their beats until after maximum traffic time, approximately 10:00 o'clock a.m.

A tourist guide told him that there was ice on the parking lot, which he checked, as well as the sidewalk coming down from the north slope of the Monument to the parking lot. He found that the walkway had been cleared of snow, but there was ice in various spots along the walkway. He immediately telephoned the dispatcher of the Park Police to make arrangements for the walkways to be sanded. By stipulation it is established that Private Good made this telephone call at 11:33 o'clock a.m. At approximately 11:55 o'clock a.m., two men were dispatched to the monument grounds with instructions to chip the ice and put sand and calcium on the walkway, and to check the other walks on the Monument grounds and do the same if they found any ice. Before Private Good went off duty at 3:00 o'clock p.m., he again inspected the walkway and found that it had been sanded. The record establishes that Mrs. Bernstein fell after Private Good had made his inspection and telephoned for remedial measures to be taken on the walkway, but before the crew arrived and sanded the walkway.

11. The Court finds as a fact that defendant United States, through its agents and employees, had exercised reasonable care by providing walkways from the parking area to

the snowbank in a reasonably safe condition in light of the weather conditions and the circumstances then prevailing. ^{3/}

12. The Court finds as a fact that plaintiff has failed to sustain her burden of proof and has not established by a preponderance of the evidence that the injuries she suffered were proximately caused by any negligent act or omission of the defendant.

-
- 3/ It is argued by Mrs. Bernstein that the defendant was negligent in piling the snow (which had been removed from the walkways) on either side of the walkway she used, knowing that the ground sloped as it neared the parking oval, and that when the snow melted on the high side, water would run across the walkway and freeze. However, the weather report shows that there were two inches of snow on the ground on December 28th, 29th and 30th. These are daily measurements taken and recorded at midnight. Considering the entire weather picture for the week preceding plaintiff's fall, and had all the snow from the walkways been piled as plaintiff suggested on the downhill side of the walkway she used, there still remained 2 inches of snow on the higher ground subject to the same melting process and water running onto the walkway.

Conclusions of Law

1. The Court has jurisdiction over this action pursuant to the provisions of 28 U.S.C. 1336(b).
2. The Court concludes that plaintiff has failed to sustain her burden of proof and has not established by a preponderance of evidence that the injuries were proximately caused by any negligent act or omission of the defendant.
Smith v. District of Columbia, 89 U.S.App. D.C. 7, 189 F.2d 671.
3. Upon the facts and the law, plaintiff has shown no right to relief.
4. Defendant United States of America is entitled to judgment.

Burnett Nelson Wallace
JUDGE

September 24th, 1969.

[Caption Omitted in Printing]

SIXTY-FIVE JUDGE, INC.

This action came on to be tried before the Court and the evidence adduced by the parties having been heard and the Court having made the Findings of Fact and Conclusions of Law, it is by the Court this 25th day of September, 1969,

ORDERED, ADJUDGED AND DISMISSED that the action be and the same hereby is dismissed in all respects on the merits and judgment is hereby decreed and granted to the defendant, with costs to be paid by plaintiff.

Ronald Sheldon Matthews
UNITED STATES DISTRICT JUDGE

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[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given this 21 day of November 1969, that June Bernstein and Herbert Bernstein, her husband, Plaintiffs in the above-captioned case hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of September 1969 in favor of The United States of America, Defendant against said Plaintiffs

John L. Evans
Attorney for Plaintiffs
708 Wire Building
1000 Vermont Avenue
Washington, D.C. 20005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----- X
JUNE BERNSTEIN, et al., :
Plaintiffs :
-vs- : Civil Action
UNITED STATES OF AMERICA, : No. 464-67
Defendant :
----- X Washington, D. C.

Thursday, September 7, 1967

Depositions of PRIVATE ROBERT L. GOOD and PRIVATE W.
FRANKLIN STEVENS, witnesses of lawful age, taken on behalf
of the plaintiffs in the above-entitled action, wherein
June Bernstein, et al., are the plaintiffs and the United
States of America is the defendant, pending in the United
States district Court for the District of Columbia, at the
offices of Butler, Koehler & Tausig, 708 Wire Building,
1000 Vermont Avenue, N.W., Washington, D.C., at 2:00 o'clock
p.m., Thursday, September 7, 1967.

APPEARANCES:

On behalf of the Plaintiffs:

BUTLER, KOEHLER & TAUSIG

By: John Ceyer Tausig, Esq.
708 Wire Building
1000 Vermont Avenue, N.W.
Washington, D. C.

On behalf of the United States of America:

LAWRENCE E. SHINNICK, ESQ.
Assistant U. S. Attorney
United States District Court
For the District of Columbia
3rd & John Marshall Place, N.W.
Washington, D. C.

2

PROCEEDINGS

Thereupon,

ROBERT I. GOOD,

a witness of lawful age, was duly sworn by the notary public and, being examined by counsel, testified as follows:

DIRECT EXAMINATION

BY MR. TRUSTO:

Q. Would you please state your full name?

A. Robert Irving Good.

Q. And how is the last name spelled, sir?

A. G-o-o-d.

Q. And where are you employed, Mr. Good?

A. United States Park Police.

Q. And in what capacity?

A. Private, motorcycle mounted duty.

Q. And how long have you been so employed?

A. Seven and a half years. I've been on a motorcycle for a year, a year and a couple of months.

Q. Now, directing your attention to December 30th, 1966, did there come a time on that date when you made a request that the walks leading to the Washington Monument be sanded and salted?

A. Yes, I did.

Q. Now, were you on duty at the Washington Monument at that time?

3

A. Well, my beat, the beat that I had that date covered the Washington Monument, the Ellipse, the Mall area, and that was part of my beat.

6

Q . . .

Now, you said a few moments ago that it had been called to your attention that the walkways to the Washington Monument grounds were a little bit slippery. How was that called to your attention?

A Well, they have a sightseeing -- they have sightseeing guides that work around the area. If I'm not mistaken I believe the gentleman's name was Dave Kaplin. Now I wouldn't swear to that but I believe he works in the area of the 16th Street parking lot soliciting for visitors. I mean, you know, for sightseeing tours. He stated that --

MR. SHINNICK: I object to the hearsay.

MR. TAUSIG: (To the witness) You can tell me what you remember.

THE WITNESS: Well, he stated that there was ice on the parking lot and I made a check and checked the sidewalk coming down from the north slope of the Monument to 7 the parking lot around the parking lot itself, and like I say, I then went to 17th Street on Constitution Avenue and made a call to the dispatcher who in turn called the maintenance yards and they had sand come out.

BY MR. TAUSIG:

Q Well, as I understand it, what you're saying is that one of the tourists soliciting guides who does his business around the Monument called to your attention the fact that he thought that the driveway and walkways were in a dangerous condition, is that correct?

A Yes. He stated that they were icy and he thought maybe that I should take a drive over and see, so I did.

Q. Did he advise you that other people had fallen?

MR. SHINNICK: Same objection.

Q. Now, you say that you then went to the walkways surrounding the Monument and inspected them, is that correct?

A. Yes, sir.

Q. Now, will you tell us as best you can what the conditions were of the sidewalk or walkway located at the south end of the 16th Street oval leading from the Monument to the parking lot?

8

A. Well, --

MR. SHINNICK: What time is this -- 10:30?

MR. TAUSIG: At the time he inspected, which I understand he is estimating around 10:30.

THE WITNESS: I'd say 10:30, 11:00 o'clock there was ice on the parking lot in spots and there was ice on the sidewalk.

BY MR. TAUSIG:

Q. Now, was the sidewalk completely covered with ice?

A. Well, I guess you'd more or less say water -- I don't recall whether it was snow, water or what, rain or what it was, but it was kind of in spots where it had, you know, kind of -- since the slope of the Monument was coming down the north side there to the south end of the sidewalk, it had run across the sidewalk and had frozen over.

Q. Well, how many feet would you estimate that there is between the Monument itself to the parking lot on the sidewalk running at the south end of the 16th Street oval?

Do I make my question clear? What's the length of that sidewalk?

A You mean from where the sidewalk starts at the base of the Monument?

Q Right, to the parking lot area.

A Well, maybe 150 yards.

Q All right. Approximately 150 yards?

A Yes.

Q Now, how much of that 150 yards was covered with snow or ice?

A Let's see. At the bottom, the north end of the sidewalk --

Q Excuse me just a second. When you say the bottom, do you mean as the sidewalk approaches the parking area?

A Yes, sir.

Q Okay.

A Well, it makes a curve. It comes down from the base of the Monument and it comes down and it makes a -- as you're coming down the hill it makes a right turn to the parking lot. I couldn't say just how many feet. I really didn't pay that much attention to it. I just noticed there was ice on it and called for the sand.

Q Well, now, let me see if we can clarify the record a little bit. You say that the sidewalk located at the south end of the 16th Street oval as it comes away from the Monument after a certain distance, that it makes a right turn? Is that correct?

A Yes, sir.

Q. All right.

Now, how many yards away from the Monument does that right turn start?

A. Gee, I guess it would -- I'd say approximately may be 75 yards.

Q. In other words, half way between the Monument
10 and the parking area as it starts to make a right turn,
is that correct?

A. Actually I guess maybe a little bit more than that.

Q. More than halfway?

A. The longest part of the sidewalk is coming from the Monument down.

Q. So we have something less than 75 yards of sidewalk leading from the parking area to the place where the sidewalk now makes a left turn coming back -- coming up from the sidewalk?

A. Yes, sir.

Q. Coming up from the parking area I mean.

A. Yes, sir.

Q. Now, how much of that area of the sidewalk -- in other words, of that length of the sidewalk of less than 75 yards was covered with snow or ice?

A. Well, I can't remember just exactly how much. There was a few icy spots but, I mean it wasn't a complete -- as I remember it wasn't a complete sheet of ice. In other words, there were just icy spots on it.

Q. All right.

Now, how wide is that sidewalk would you say?

A. Oh, let's see. I'd say approximately 5 feet wide.

Q. Or maybe 2 yards? Five feet to 2 yards, is 11 that correct? That would be about right?

A. Approximately, yes.

Q. All right.

Now, the rectangular area of approximately 75 yards by 5 feet or 6 feet, how much of that would you say was covered with ice or snow? Half of it? A quarter of it? A third of it?

A. No. It wasn't that much covered with it. Maybe a third, if that. It was like I say, just a few icy spots around. It wasn't like I say a complete sheet of ice. Maybe a quarter or a third or something like that.

Q. All right.

A. If that.

Q. Now, could you describe for us the shape of that ice or snow?

A. Well, where the spots were it was fairly smooth.

Q. Was it thin, let's say less than half an inch in height?

A. Yes, I'd say maybe approximately less than a half an inch, yes.

Q. And was it irregular in any way?

A. I don't remember. Like I say, when I went up there I made a check and I saw there was ice on there and just went up and called for the sand. I mean I didn't

really check it that close. I mean I did check it to see if there was ice on the ground, but I didn't check it, you know, really that close.

Q. In other words, you couldn't say at this time from recollection whether there were humps or ridges or whether it was just smooth ice, is that correct?

A. Well, like I say, I really didn't check it that close. I did check though to see if there was ice. There was ice spots on there and I left the area to go call for sand. I didn't really examine, you know, the thickness of it, and so forth.

Q. Now, I ask you to assume that this weather report which is Plaintiffs' Exhibit No. 1 for identification to this deposition also shows that on December the 28th, 1960, that 1.8 tenths inches -- in other words, one and eight-tenths of an inch of snow fell in the Washington area on that date, December 28th.

When you inspected the sidewalks around the Washington Monument on December 30th, was there such snow on the sidewalks -- that amount of snow on the sidewalks at that time?

A. No. The sidewalks were clear. There was apparently I guess water or something had drained across the sidewalk in spots and had frozen up. The sidewalks were clear. Like I say, there was water on it where it had frozen and made ice spots.

* * *

26 Q Well, I'm not trying to put words in your mouth, Officer. I'm trying to get to an understanding of what you're saying.

Am I correct in understanding that there were spots or patches of ice which ran all the way across the sidewalk at intervals?

A More or less patches like that where the water had gotten across the sidewalk part of the way or froze in patches like that.

* * *

28 Q Was it your responsibility as a Park Policeman assigned to the beat of the Washington Monument on December 30th to determine whether safety measures such as spreading sand and salt or clearing the sidewalks around the Washington Monument were required?

A Well, on the area that we patrol if it's sand or salt needed then we call for it. In other words, I mean where there's ice or maybe a hole in the road or anything such as that, if we feel that it's necessary to have we call the dispatcher.

Q That's part of your duty, is that correct?

A Right.

* * *

CROSS EXAMINATION

BY MR. SHINNICK

41 Q How long was it between 10:00 o'clock, the time you came to work at the Washington Monument that morning, and the time you parked your motorcycle, got off and took a look at this particular area we're talking about?

A I didn't go directly to the Washington Monument.

down Constitution Avenue the sightseeing guide motioned for me to come over, and I sat at the parking lot.

Q Could you tell us approximately what time that was? I know I can't pin you down exactly because that's an estimate. Could you give us your best estimate?

A I would say approximately, say, between 10:30 and 11:00 o'clock.

Q Can you tell us the approximate period of time that you viewed the sidewalk area? Was it approximately 30 seconds, 10 minutes, or your best recollection of that.

A Well, I'd say maybe approximately 5 to 10 minutes, because I did -- well, let's say approximately 5 minutes, because I got off the motorcycle. I walked up the sidewalk to the sidewalk and checked around and came

42 back down.

Q Can you recall approximately how far up the sidewalk you walked?

A Well, I walked I'd say almost to the top.

Q When you say to the top, do you mean to the curve?

A I should say almost to the end of the sidewalk before it hits the circle at the base of the Monument.

Q Is that the curve we were talking about before -- approximately 75 yards up when you hit that curve?

A Right. In other words, you walk approximately 75 yards and then you make -- say if you were going to the Monument, you would turn to the east, or to the left, and walk up the slope to the Monument. I walked almost to the top and then I came back down.

43

BY MR. SHINNICK:

Q Now, these puddles, patches you referred to when Mr. Tausig was asking you questions, were they located in the area after you had turned the curve to walk toward the Monument or before you had turned the curve?

A There were a few on the part --- well, say approximately 75 yards before you make the turn there was a few icy spots there, and then after you make the turn and start up there were a few icy spots up on the slope a little bit.

Q Were these few icy spots you're referring to in both of these sections closer to the bend than either end of the 75-yard portions?

A Yes, I'd say they were closer down towards the bend where you make your turn to come out to the parking lot.

51

Q Getting back now to these icy spots that you viewed on the sidewalk, could you tell us their approximate geometrical shape? Were they more rectangular, more circular? What did they look like?

A They were more or less I'd say oblong. It had apparently been where water had run down over the sidewalk and froze. In other words, they were kind of a rectangular oblong shape.

REDIRECT EXAMINATION

BY MR. TAUSIG

56

Q Well, in other words, to your knowledge, is it normal for the Park Police to have officers whose beats include the Washington Monument around the clock?

A. Yes, sir.

Q. In other words, it's a 24-hour patrol of that area, is that correct?

A. Yes, sir.

Q. So, to the best of your knowledge, there had been a 24-hour patrol by the Park Police around the Washington Monument, let us say from December 24th through 57 December 30, 1966?

A. Yes, sir, it should have been covered.

Q. ***

Mr. Shinnick and I have been attempting to fix the time according to the best of your recollection of certain events that happened, events of December 30th.

A. Yes, sir.

Q. I won't go over that ground, but I want to ask you this: Based upon the best of your recollection, are 58 you able to say one way or another whether the sand that you say was put down on the walkway and on the parking lot of the Washington Monument on December 30th was put down there before or after 11:50 a.m. in the morning of December 30th?

A. Was it put on, you say, before 11:50?

Q. Right.

A. No, sir. I would say it would be after 11:50.

Q. ***

You told us that in connection with your patrol that your duties included inspecting the grounds around the Washington Monument, is that correct?

A. Yes, sir.

Q. So, normally speaking, if Mr. Kaplan had not called you over to the curb and brought your attention to the fact that there was an icy condition on the sidewalks around the Washington Monument, you yourself would have discovered that by getting off the motorcycle and walking on those walks, is that correct?

A. Yes, sir.

Q. All right.

Now, to the best of your knowledge, are other officers of the Park Police assigned to boats including the Washington Monument, or that include the Washington Monument, also required at other times of the day to inspect the grounds?

A. Yes, that's part of the beat. If there appears to be icy conditions or something they'd probably get out of the cruiser, walk over and inspect; if it's necessary for sand, they would call to have sand brought out.

61

W. FRANKLIN STEVENS,

a witness of lawful age, was duly sworn by the notary public and, being examined by counsel, testified as follows:

DIRECT EXAMINATION

BY MR. TAUSIG:

Q. Officer, would you please state your full name?

A. W. Franklin Stevens.

Q. And where are you employed, sir?

A. United States Park Police, Washington, D. C.

Q. Were you so employed during the month of December, 1966?

A. I was.

Q. Now, directing your attention to December 30, 1966, did it come to your attention that a lady by the name of June Bernstein had fallen and been injured on the walkway, or a walkway located at the south end of the 16th Street oval near the Washington Monument?

A. Yes, sir.

Q. All right.

Now, how did that come to your attention, sir?

A. I was parked in a marked cruiser at the north 62 end of the parking oval. I don't remember the exact time, but I remember a vehicle occupied by a man, woman and several children. The car pulled up beside me and the man asked me where the nearest hospital was. I asked him then what had happened. He said his wife had fallen and broken her ankle. I asked him if he wanted the ambulance, and he said no, so I directed him to George Washington Hospital.

I later found out that the man was a Mr. Bernstein and the lady a June Bernstein. I believe June is the name.

* * *

66 essentially what he said. And I advised him to contact an attorney.

Q. Do you recall Mr. Bernstein asking you --
strike that.

Q. Now, did your assignment or beat on December 30th include the Washington Monument grounds?

A. It did, sir.

Q. And how long had you been on that beat?

A. What was the year on that?

Q. '66.

A. Approximately 3 years.

Q. In other words, your beat had included the
67 Washington Monument grounds constantly for 3 years?

A. Yes, sir.

Q. It was a permanent assignment, in effect?

A. Yes, sir.

Q. Now, did your duties on that assignment include the inspection of the walks leading to the Washington Monument during your hours of duty?

A. Yes, sir.

79 Q. Do you recall whether between December 24th, 1966, and December 30, 1966, you had, in fact, inspected the Washington Monument grounds sidewalks?

A. Specifically I couldn't say.

Q. That was included in your duties, is that correct?

A. Yes, sir. I couldn't say when I inspected it or how I inspected it or at what times. However, I can say that I did inspect them, but I couldn't pinpoint the times.

80

Q. *

Did you inspect the walks at the Washington Monument at any time on December 30th?

A. Yes, sir.

Q. When?

A. After I had talked to Mr. and Mrs. Bernstein at the hospital.

81

Q. What condition did you find them in?

A. The snow was banked on each side of the walk. The walks were clear of snow. The area in which --.

Q. Excuse me a moment. When you say the walks were clear of snow and the snow was banked on each side of the walk, how high were those banks? Can you tell us?

A. Approximately a foot. That's strictly a guess. I didn't get out and measure them.

Q. Right.

A. The sidewalks were splotchy. By that I mean part of them were clear. Part of the sidewalk was clear and part was icy. Now, this was -- I don't know exactly how to word it now. Well, we'll say that 2 or 3 feet of sidewalk would be clear and maybe another 2 or 3 feet would have ice on it.

Q. In other words, at intervals?

A. Intervals, yes, sir. That was the word I was trying to think of but I couldn't.

On this particular sidewalk that the Bernsteins had used.

Q. Now, this sidewalk is identified in your report as the sidewalk located on the south end of the 16th Street

oval. Can you tell us the approximate length of that sidewalk from the parking lot to the pavement that goes around the Washington Monument?

A. Approximately 250, 300 feet.

Q. Would 150 yards be about right, would you say?

A. Yes, sir.

Q. All right.

Now, as I understand it, that walk does not go in a straight line from the parking area to the Monument but goes about approximately half way towards the Monument and then bends to the left, is that correct?

83 A. Yes, sir.

Q. All right.

Now, this icy condition that you were telling us about, was that icy condition all the way along that 150 feet when you inspected it in the afternoon -- 150 yards I mean?

A. If I remember correctly, the area that I investigated included maybe 100 yards. I didn't go all the way to the top. However, during that period of 100 yards the condition was as I stated previously.

Q. When you say you investigated for 100 yards and did not go all the way to the top, is it correct to say that you inspected or investigated the pavement starting where it starts at the parking area and going up the hill 100 yards?

A. Yes, sir.

Q. And that's where you understood Mrs. Bernstein fell, is that correct?

A. Yes, sir.

Q. All right.

Now, from your description, I understand that there was, let's see, a clear spot and then there would be a path of ice across the walkway, is that correct?

84 A. Sometimes completely across; sometimes part way.

Q. Now, how wide would you say those patches of ice were, or paths of ice were?

A. It varied. Some would protrude only a matter of inches from the end of the sidewalk -- well, the end of the sidewalk itself where the snow was banked. As you come from the Monument and you get to approximately the area where the sidewalk bends -- we're approaching the parking lot now, where it bends, it sort of slopes down into a valley where I would assume that snow melting, the water from it would run down. Now, in this particular area --.

Q. You mean run down across the sidewalk?

A. Yes, sir.

Now, in this particular area here it would be completely frozen with ice. No part of the sidewalk would be visible. This would be completely across. Of course, I'm not an expert on snow and ice, but I would assume that the water would freeze right there and stay there. In other words, it wouldn't go closer to the parking lot from this one particular valley which was approximately, oh, 20, maybe 25 feet in length. And then after this valley, then it would become intermittent with ice and clear sidewalk.

85 Q I think I'm beginning to get a better picture of the thing. I want to check with you again.

Let's start at the place where you step onto the sidewalk where Mrs. Bernstein fell, right off the parking lot.

A Yes.

Q Do I understand from the testimony you've just given that that sidewalk was one sheet of ice without an apparent break in it for, let's say for 25 yards up that sidewalk?

A That particular portion would be broken.

Q Would be broken, the first 25 yards?

A Right.

Q Now, what about the next 25 yards?

A That would be a sheet of ice. That would put you approximately in the valley where the slope ends and it sort of levels off.

Q So, in other words, you have about 25 yards of a sheet of ice on that sidewalk, is that right, starting about 25 yards from the parking lot?

A Well, maybe 25 yards is a little bit too long. I would say roughly between 25 and 50 feet. Of course, the first 25 yards from the parking lot is broken and then maybe there's --.

Q Broken in the sense of ice?

A Intermittent with ice and clear sidewalk.

Q Right.

A And then the area of approximately 25 to 50

feet would be a solid sheet of ice. This would be approximately the valley. I call it the valley.

Q. Well, in other words, approximately 25 feet after you left the parking area and walked up that walk towards the Monument, you would then encounter a solid sheet of ice for about 25 to 30 feet, is that right?

A. Yes, sir.

Q. Well, now, when you got above that 25 or 50 feet, what was the condition of the sidewalk?

A. Intermittent again with ice and clear sidewalk.

Q. Now, in the areas -- in the two areas where the sidewalk was intermittently clear and intermittently had ice on it, give us an approximation of how much of those two areas was covered with ice and how much was clear.

A. I couldn't say.

Q. Would you say each of those two areas -- of each of those two areas half was clear and half was ice?

A. I couldn't swear to it, but I would approximate
87 half and half.

Q. Now, would you describe this ice to us?

A. I don't understand how you mean.

Q. Well as an example, was the ice that you have been describing on this sidewalk one thin smooth sheet, or was it irregular with humps in it. And if so, how large were the humps; or if there were ridges, how many inches off the sidewalk did the ridges extend?

A. I would describe it as a thin sheet of ice.

Q. Smooth?

A. (Nods in the affirmative)

Q. Slippery?

A. Yes, sir.

89

* * *

Q. * * *

Now, when you inspected the sidewalk and saw this icy condition, was there any sand and salt on the ice?

A. Not on that particular sidewalk. However, the maintenance men were working on the other sidewalks. I could see them dropping sand and salt, and so forth. Apparently they hadn't gotten to this one yet.

91

Q. Do you have any knowledge of how long the icy

condition on this sidewalk leading from the Washington monument which you've described, that you inspected on 92 the afternoon of December 30th, how long that icy condition had been in existence?

A. Ever since it had snowed and the snow had been removed from the sidewalk during the day -- the warm part of the day the snow would melt. Then in the evening the cooler air would freeze it -- would freeze the melting snow.

* * *

94

Q. Now, you made a statement a few moments ago that to the best of your knowledge this icy condition that you described on the sidewalk had been there since it snowed and the snow was piled up on each side of the sidewalk, is that correct?

A. The icy condition was from the snow melting, the water running onto the sidewalk and then freezing in the

evening or at night, anything that the sun went down and the colder temperatures come about.

And this condition had occurred every night or every morning when an investigation of the grounds was conducted and it was found to be the same where it would be partly clear and partly icy ever since it had snowed the first time, I believe you said it was the 24th of December.

* * *

100 Q All right.

Has it been your experience that as soon as we have a snow that lays on the sidewalks at the Washington Monument grounds, that the snow removal crews at Brentwood or at East Potomac clear the sidewalks?

A As soon as possible, yes, sir.

Q Right.

Now, it's been their practice to pile snow on both sides of this walk where Mrs. Bernstein says she fell, is that correct?

A Yes, sir.

Q During the 3-year period you have observed that as soon as you get the snow piled and it warms up, the temperature warms up, then you begin to have this icy condition on the sidewalks, is that correct?

A Yes, sir; and when the snow starts melting.

Q It runs down the slope across the sidewalk and you have the icy condition?

A Yes, sir.

Q Which we have talked about -- which you have talked about?

A. Yes, sir.

Q. And that has been your experience, that that occurs -- has occurred repeatedly over the last 3 years, is that correct?

A. Yes, sir; that's right.

102 Q. Did you ever report those facts to your superior?

A. Well, how do you mean -- verbally, written, or -+?

Q. Yes, any way.

A. Yes, sir; verbally several times; and several times it was brought to my attention by other officers.

Q. Did you ever suggest to your superior that the snow ought to be piled on the lower slope? In other words, beneath or below the sidewalk instead of on both sides?

A. No, sir.

Q. Do you have any knowledge as to the last time this particular walk had been salted and sanded prior to the afternoon of December 30, 1966?

A. No, sir.

* * *
CROSS EXAMINATION

BY MR. SHINNICK

118

Q. Did Mr. Bernstein have occasion to show you where he alleged his wife fell?

A. No, sir.

Q. Did he tell you, describe to you where he alleged his wife fell?

A. Yes, sir.

Q. If you can recall his words, how did he describe it to you, sir?

A. I can't recall his words. Usually if -- well, actually the only way I can answer this question is the usual procedure I go through with people that are new to the area. I've found that there are several landmarks that if you point them out to the tourist, then they can approximately give you the location.

Q. Let me ask the question in this fashion. If you can't recall the words he used to describe it, could you tell us what your impression -- strike that.

Could you tell us from what he said, did you get an idea as to where he was referring to?

A. Yes, sir.

Q. Where was that, sir?

A. An area south of the parking lot. The amount of feet I don't recall exactly, the approximate amount of feet. However, it was on the south side of the kiosk, which is the building that's south of the parking lot, and as best that I could determine, it was somewhere in this valley that I so described before.

Q. Now, getting to that valley or area as you describe it as a valley.

Is that between the parking lot and the curve portion of the sidewalk? The curve portion of the sidewalk that goes up to the Monument?

A. That's approximately at the curve.

Q. Did you have any further conversation with them at the hospital about where it was that Mrs. Bernstein is alleged to have fallen?

A. Yes, sir. It was there that I found out approximately where she had fallen from both Mr. and Mrs. Bernstein's description of the area.

131

Q. Did they indicate to you, sir, which way they were headed, whether toward the Monument or back toward their car when it was alleged that she slipped and fell?

A. They were going back to their car.

Q. Did they indicate, or can you recall whether or not they indicated that they had passed by this area before on their way from the car to the Monument?

A. I don't know whether they did or not.

Q. Would this particular route be the route to take between their car and the Monument, if you know, sir?

A. Yes, it would.

MR. TAUSIG: You mean the only route? Is that what you're saying?

MR. SHINNICK: Is it the only route?

THE WITNESS: It's the most convenient route. I guess they could have walked up through the snow on the field, but assuming they didn't, there are two sidewalks that lead from the parking lot, and they go around the kiosk, combining into one sidewalk which goes up to the Monument.

BY MR. SHINNICK:

132

Q. And it's on this one sidewalk where it is alleged that Mrs. Bernstein fell?

A. Right.

134 Q. When you characterized the sidewalk as splotchy were you talking about puddles, liquid, water?

A. No. By using the word splotchy, I mean part of the sidewalk would be completely clear and then another part would be icy.

Q. How wide would the sidewalk be in your estimation?

A. Six feet, I believe. I don't know for sure.

Q. And you say now a part was clear and a part was icy. Is it icy across the entire 6 feet of the sidewalk?

135 A. At times, yes. At other times it would only be a matter of a few inches on the sidewalk.

Q. Well, calling your attention to this particular day and the scene as you viewed it, could you describe to us the conditions on the sidewalk?

A. You mean the approximate area where she fell or the sidewalk as a whole?

Q. Why don't you start with the approximate area where she fell and then the sidewalk as a whole.

A. The approximate area where she fell was almost entirely icy.

Q. This was across the entire width of the sidewalk?

A. Across the entire width of the sidewalk.

Q. Well, what distance along the sidewalk would that be true?

A. May a foot at a time. In other words, some places in the area of the mass of ice would be clear, whereas a piece maybe even six inches wide -- six inches in diameter, would be clear. However, the area surround-

ing it would be ice, and it may go for two feet and be nothing but ice before you got another clear spot. And it was veering all over the sidewalk. There wasn't any set pattern.

138 Q Do you recall during the week prior to December 30th whether the sidewalks in the area of the Washington Monument were cleared of snow either by means of using a snow blower or men out there with shovels removing it?

A Do I recall if it was done?

Q Do you recall either seeing it done or do you recall seeing the absence of snow on the sidewalks?

A I recall seeing the absence of snow on the sidewalks.

139 Q All right.

Can you recall ever seeing snow on the sidewalks during that week? The sidewalks now I'm talking about are the sidewalks in the area of the Washington Monument?

A No, I can't recall.

Q Can you recall seeing maintenance crews that day and/or that week working in the areas of the sidewalks of the Washington Monument?

MR. TAUSIG: Excuse me. By maintenance crews, do you mean snow removal or ice crews?

MR. SHINNICK: Whatever they might be doing out there.

THE WITNESS: That particular day, other than that day I can't recall.

MR. SHINNICK: I see.

BY MR. SHANNON:

Q. If maintenance records reflect that sand had been placed on the sidewalk in the area of the Washington Monument during the week of December 30th, could it be possible that your recollection is faulty?

A. It's a possibility, yes. However, I don't think so.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUNE L. BERNSTEIN

and WERNER BERNSTEIN, Her Husband,

Plaintiffs,

v.

Civil Action
Number 464-67

THE UNITED STATES OF AMERICA,

Defendant.

WASHINGTON, D.C.

March 19, 1969

The above entitled matter came on for hearing before
THE HONORABLE EUPHILIA SHELTON MATTHEWS, UNITED STATES DISTRICT
JUDGE, the court sitting without a jury, at 10:00 a.m.

A P P E A R A N C E S

For the Plaintiffs:

John Goyer Tausig, Esq.

For the Defendant:

Lawrence Shinnick, Esq.,
Assistant United States Attorney.

* * *

14

JUNE L. BERNSTEIN DIRECT EXAMINATION

THE WITNESS: We were visiting the tourist attractions - the Capitol, White House, National Observatory, the F.B.I. complex of buildings, The Federal Bureau of Engraving, the Smithsonian Institute.

BY MR. TRUITT:

Q. Now, to the best of your recollection, while you were here in Washington, D.C. during that week leading up to December 30, 1966, had it snowed? A. Yes, it did.

Q. When you visited any of the other tourist attractions which you just enumerated, what were the conditions of the walkways upon which you walked?

A. They were all clear.

* * *

15

Q. Now, approximately what time did you get to the Washington Monument grounds?

A. Around eleven o'clock.

Q. And how did you get there?

A. By car.

Q. And whose car?

A. Our car.

Q. What kind of car was it?

A. We have a Ford station wagon.

Q. And when you say "we," who were in your party?

A. My husband, my two children, and myself.

Q. Now, did you in fact visit the Washington Monument?

A. Yes, we did.

Q. And how did you get from your car to the Washington

Monument?

A. We walked up the walkway closest to the parking lot.

Q. And which parking lot are you referring to?

A. This was the Sixteenth Street Oval parking lot.

THE COURT: This was not the way that you went down eventually, was it?

THE WITNESS: Yes, it was the same way.

BY MR. TAUSIG:

Q. Now, did you state the time, approximate time, you arrived at the Washington Monument?

16 A. Yes, around eleven o'clock.

Q. Now, you went from the parking area up the walkway to the Washington Monument grounds, the Washington Monument itself, is that correct?

A. Yes.

Q. What did you do there?

A. We went up the elevator and we visited upstairs for a while looking in all the directions that the Washington Monument faces. My children and both my husband and I all looked through the telescopes upstairs at the Washington Monument.

Q. And how long did you stay at the Washington Monument approximately?

A. Approximately forty-five minutes to an hour.

Q. And then what did you do?

A. Then we left the Monument. We walked down. We went down the elevator and started walking down the pathway leading back to our car.

Q. Now, when you left the base of the Monument, in other words, after you got down the elevator and you walked outside of

the Monument, when you left the base of the Monument and started down the walkway, was your entire family with you?

A. Yes, we were all together.

Q. Were you all walking together?

A. No, we weren't.

Q. Who was with you?

17 A. My daughter was with me, and my husband and my son were walking ahead of us.

Q. About how far ahead of you?

A. About ten to fifteen feet in front of us.

Q. And on your way up to the Monument, what had you noticed about the physical condition of the walkway?

A. I noticed that it was an icy condition of the walkway, on the walkway.

* * *

Q. Now at that time did you observe any snow?

A. Yes, I did.

Q. Where?

A. Piled up on the side of the walkway.

Q. Was there any snow on the walkway itself?

A. No.

Q. Now, when you said that there was an icy condition on the walkway, can you describe what you observed as you walked

18 up, to Her Honor?

A. There was ice across the whole, entire walkway in certain areas.

Q. Were those areas where the ice was completely across the walkway an area closest to the parking lot?

A. Yes.

Q. Was it closest to the Monument grounds?

A. No. The area very close to the Monument grounds was clear, but from the parking lot approximately two hundred feet up, or two hundred and fifty feet up, were very icy and covered with ice.

Q. Were there any areas in which the walk was not completely covered with ice?

A. Yes, there were some areas that were only partially covered with ice.

Q. And as a result of observing that, can you tell Her Honor how you were walking when you left the Monument grounds?

A. I was walking very carefully and I told my children to please be careful because it was very icy.

Q. Now, you said that your daughter was with you, and your husband and son were walking in front of you at the time you left the base of the Monument, is that correct?

A. Yes.

Q. About how far in front of you were your husband and son?

19 A. About fifteen feet in front of us.

Q. And did they maintain that distance as you walked down the walkway?

A. Yes, they did.

Q. And what did your daughter do?

A. As we started walking away from the base of the Washington Monument, my daughter walked a little faster to catch up with her father and brother, and at that time I told her then to be very careful because the walk was very icy.

Q. And told her, is that correct?

A. Yes, and -

Q. Alright. Now, when, or as you proceeded down the walkway, was the distance between you and your husband and so maintained, approximate distance?

A. Yes.

Q. Did you in any way increase the rapidity of your walk or the speed of the walk?

A. No. If anything, I slowed down. I didn't rush.

Q. Now, tell Her Honor what happened to you as you went down that walkway.

A. After I walked approximately halfway down, I felt my foot slipping out from underneath me and my foot followed a ridge that the ice had formed, and my body went the other way. My foot went to the left, my body went to the right.

I tried to put my hands out to try to gain my footing but my body was twisted the other way and my leg was one way, and I felt this piercing pain in my left ankle.

THE COURT: You said that your foot went left, and that your body went to the right?

THE WITNESS: Yes.

THE COURT: And your foot, you said, followed this ridge of ice?

THE WITNESS: Ridge of ice.

THE COURT: Alright. Go ahead.

BY MR. TAUSIG:

Q. Now, Mrs. Bernstein, as a result of this accident that you have just described, where did you find yourself?

A. I found myself on the ice, on the icy walk, on the ground.

In other words, you were prone on the ground, is that correct?

A. No, I was in a sitting position with my -- my leg was out one way and I was, you know, I was half crouched -- not really sitting but not lying down either. I was in almost a sitting position.

Q. Now at that time -- strike that. You said that your foot slipped, your left foot slipped and followed a ridge in the ice. How do you know that?

A. I saw it. I watched it. I felt it slip and I looked at it as it was slipping and I saw the icy ridge that my foot had followed.

Q. When you were in this sitting position on the ground, what did you observe?

A. Well, I felt a very sharp pain in my ankle and I went to grab for my ankle which was in this icy area.

Q. Are you saying to the court that at the time that you were in this prone or sitting position on the ground, that you observed your foot and the ground?

A. Yes.

Q. What, if anything, when you were on the ground, or between that time and the time you got to the car, did you observe about your hands?

A. They were clean. They were clean and they were cold from being on the ice but there was no grit or sand or anything like that on my hands. They were completely clean.

Q. When you went down, did your hands go along the ground, touch the ground?

A. Yes, they touched the ground.

23

(Whereupon Plaintiff's Exhibit Number 4 was marked for identification.)

24 Q. Mrs. Bernstein, I am going to show you a photograph and I will ask you that while you may hold it in your hand, don't rub your hand across it, and hold it as far away from you as you can to be able to see the photograph.

Now, I show you a photograph which is marked Plaintiff's Exhibit Number 4 and ask you whether you can identify the scene?

A. Yes. This was the area that I fell in.

Q. And can you tell us whether that picture shows the walkway where you fell?

25

A. Yes, it does.

Q. And this fall and area you are talking about was on December 30, 1966, is that correct?

A. Yes.

Q. Now, on this picture can you tell us whether you are able to state or show on that picture where your Ford station wagon was parked?

A. Yes, I can.

Q. And where was it parked?

A. Right in this-- right in the first parking spot on the closest to the Washington Monument.

Q. Is that where the only black car shown on this picture is?

A. Yes.

* * *

Q. Now, to the best of your recollection, Mrs. Bernstein on December 30, 1966, was the picket fence at this scene?

A. No, there was no picket fence at that time.

26 Q. Now, Mrs. Bernstein, I am going to give you my pen and ask you to mark on this photograph as close as you can -- well, first of all, I am going to ask you to tell Her Honor, as closely as you can, the exact spot where your fall occurred by references to objects or other matter on that photograph. Don't mark it, I just ask you to tell it.

* * *

A. There's a gentleman walking in a group of five people and I would say approximately where he is walking. There's a little girl and then this gentleman and then two women and another gentleman. Approximately we were in the middle of this particular setting, this group.

THE COURT: Did you say the man in the middle of the group?

THE WITNESS: Yes. There's a little girl and there's a gentleman and two women and another gentleman. I would say in the center of that particular group is approximately where I fell.

BY MR. TAUSIG:

Q. Alright. Now would you take my pen and mark that spot.

(Whereupon the witness made a

mark on the photograph which Mr.

Tausig then showed to Mr. Shinnick

and then to the Court.)

39

CROSS EXAMINATION

BY MR. SHANNON:

Q. Mrs. Bernstein, I won't keep you long. I just have a few questions.

Do you recall the type of footwear you were wearing on the day you fell?

A. I was wearing flat, ankle-high boots, shoe boots.

Q. Leather soles and leather heels, is that correct?

A. Yes.

Q. Do you recall the type of footwear your children were wearing?

A. I think they were wearing street shoes.

Q. Do you recall the type of footwear your husband was wearing?

A. Street shoes.

Q. Do you recall whether you, your husband or your children were wearing rubbers, or boots, or anything of that nature?

A. No.

Q. Rubber-soled shoe or anything?

A. No.

Q. No, they were not?

A. No, they were not.

Q. Can you see the board from where you are sitting, Mrs 40 Bernstein?

A. Yes.

Q. Mrs. Bernstein, if I call this square I have just drawn on the board the Washington Monument looking down on it from the top, and we say this is the oval, down here on the left side where

I am drawing, is the parking lot where your car was parked on this day in question, and I will just draw a path up to the monument something like this, is my understanding correct that that's approximately what the situation looked like?

You left your car in the parking lot, got out of it, and walked up that path to the Washington Monument?

A. Yes, that's approximate.

Q. Is that approximately correct?

A. I think so.

Q. And the path you walked up to the Washington Monument was the very same path that you took when you returned to your car?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I believe, as I understood your testimony, when Mr. Fausig was examining you, you said that before walking up to the Monument you noticed that the walk was icy, ice covered, and you asked your children, or warned your children to be careful, to walk carefully?

41 A. No, not walking up.

Q. Excuse me, then. Tell me what you did say. I misunderstood.

A. I didn't say anything walking up to the Monument.

Q. Did you have any trouble walking up to the Monument?

A. No.

Q. None whatsoever?

A. No.

Q. Did your children have any trouble walking up?

A. No.

Q. When you were walking up, did you personally notice any ice or snow on the walk?

A. I noticed that the walk was icy.

Q. You noticed that the walk was icy. Did you notice whether or not there was any snow on the walk?

A. There was no snow on the walk.

Q. Did you recall, after noticing that the walk was icy, whether or not you said anything to your children, "Be careful. It looks icy," or anything of that nature?

A. When?

Q. As you were walking up or slightly before you began to walk up.

A. No, I didn't say anything at that time.

Q. You didn't say anything but you did notice it, is that correct?

A. Yes.

Q. Do you recall whether your husband said anything to your children at that time?

A. No, he did not.

Q. Do you recall whether or not you mentioned to him, "It looks icy."

A. I did not say anything to him.

Q. You just noticed it looked icy but didn't say anything to anyone, is that correct?

A. Yes.

Q. Now, as I understood your testimony you arrived at the

A. Correct.

Q. Walked directly up to the Monument, spent approximately forty-five, fifty minutes or an hour upstairs in the Monument after looking round through the telescopes and so on, and then returned to your car?

A. Yes.

Q. As you left what we will call the base of the Monument, very close to the Monument, and began your descent down to the path, was it at that time you noticed that the path was icy and warned your children?

A. At the base of the Monument before walking downward is when I told my children to be careful, the walk is icy.

Q. Is this the walk you gave reference to, this walkway 43 you used to get up to the Monument?

A. Yes.

Q. Did your children take any precaution as a result of your warning to them, if you recall?

A. No, I can't recall.

Q. Do you recall whether or not your husband took any precautions as a result of your warning?

A. No, I can't recall.

Q. Do you recall whether you yourself took any precautions as a result of noticing it was an icy condition?

A. Yes, I walked with great care.

Q. You say you walked with great care. Is it fair for me to draw the inference that you were carefully watching where you put your feet and where you were walking?

A. Yes.

Q. You were watching carefully. Now, Mrs. Bernstein, you were not the only family at the Washington Monument grounds that morning, were you?

A. No.

THE COURT: What was that question?

BY MR. SHINNICK:

Q. You were not the only family at the Washington Monument grounds that morning, is that correct?

A. Yes.

Q. In fact, there were several families or a number of people out at the Washington Monument that morning?

A. Yes, there was.

Q. Is it a fair statement for me to say that there were more people after you had come down from the top of the Monument than there were when you were going up?

A. Yes, there were.

Q. The crowd had increased during that hour that you were there?

A. Yes, it had.

Q. And did you notice other people parking in this parking lot and using this walk to ascend up to the Monument?

A. I didn't notice anyone using the parking lot but I did see people walking up the walk.

Q. People walking up the walk. Is it fair to say that you saw them walking up the walk when you were walking up the walk, and you saw other people who were walking down the walk?

A. Yes.

Q. In other words, you were on the walk two different

times and there were other people on the walk at both times?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Did you have any trouble walking from the parking lot up to the Monument?

A. No, I did not.

45 Q. Did you notice anyone else having any trouble?

A. No, I did not.

Q. Did your husband or your children slip or almost slip or anything like that?

A. No, they did not.

Q. Did they have any trouble on the way down?

A. No, I don't think so.

Q. Is my understanding correct that when you fell you were in fact walking along approximately ten to fifteen feet behind your husband and your two children?

A. Yes, I was.

Q. Were there other people fairly close to you at the time you fell?

A. Yes.

Q. Could you recall how many?

A. There were a few people walking up.

Q. People walking up towards the monument?

A. Towards the Monument.

Q. As you were coming down, is that correct?

A. Yes.

Q. Do you possibly recall if it was a group of people,

A. There was a few people. There was this gentleman I noticed that helped my husband with me afterwards. He and his party. He and I guess his wife and his daughter or two females 46 in the party, walking up and close to him.

Q. Approximately three people in his party were very close at the time you fell, is that correct?

A. Yes.

Q. Approximately how wide is that walk up there, do you recall?

A. I really don't know.

Q. Was it wide enough for your family to walk four abreast?

A. No, I don't think it was.

Q. Was it wide enough to walk side by side with your daughter in comfort?

A. Yes.

Q. It was. So we could say then it was approximately wide enough for two people to walk side by side but not wide enough for four people to walk side by side?

A. No. It probably was wide enough for four people to walk side by side.

Q. It probably was?

A. Yes.

Q. But for one reason or another your family chose not to walk in that fashion?

A. Yes.

Q. Is the reason that you chose not to walk in that fashion because you were going much slower than your husband and your two children?

47 A. Probably.

Q. That's correct, isn't it?

A. Yes.

Q. Thank you. Do you recall when this group of three people were approaching you just prior to your fall whether you took any steps to get out of their way, to let them pass by, or whether you moved from your path?

A. No, I did not.

Q. You continued on?

A. Yes.

Q. - Straight fashion. Were you walking approximately in the middle of the sidewalk, would you say -- this is just now a few minutes before you fell?

A. In the middle.

Q. You say you were in the middle?

A. Of the sidewalk.

Q. Not on either side. Approximately in the middle?

A. Right.

Q. Those shoes you were wearing on that morning, Mrs. Bernstein, the ones with the leather sole and leather heel, do you recall whether or not they were new shoes?

A. No, they were not new shoes..

Q. They were shoes you had had for some period of time?

A. Yes.

Q. You had worn them before?

A. Many times.

Q. Had you worn them before in Washington when you were down on that occasion?

A. Yes.

Q. You had?

A. Yes.

Q. It was rather cold that morning, wasn't it?

A. Very cold.

Q. Below thirty-two degrees?

A. Yes.

Q. You know that?

A. It was very cold.

* * *

Q. Mrs. Bernstein, directing your attention to the area in which you fell, the actual piece of ground where you fell, is my understanding correct that you have testified that the walk was icy across its width, at that point across its entire width?

A. Yes, it was.

Q. Now, approximately how long was that patch of ice?

A. You mean how far down it went?

Q. Say the patch of ice was a rectangular piece of ice.

It went across the entire width of the sidewalk, as I understand

49 it. About what distance was it in its other dimension?

A. I really don't remember.

Q. You don't recall?

A. No.

Q. Do you recall if it looked more like a combination of snow and ice or if it looked like a puddle perhaps that had frozen over?

A. It was an uneven patch of ice. There was ridges and it was not a smooth slick of ice. It was a thick and uneven patch of ice.

Q. Thick and uneven as opposed to smooth?

A. Yes.

Q. Is your present recollection?

A. Yes.

Q. Did you happen to notice that spot on your way up?

A. I noticed the entire-- the general look of the walk-way, not that entire spot --- I mean, that particular spot.

Q. On the way up, then, your attention wasn't drawn to this particular spot but you did walk across it?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Is there any reason for us to suppose that it might have changed its character in that hour that you were up there in the Monument, or was it the same when you came down as it was
50 in fact when you went up?

A. I have no idea. I assume it was the same as it was.

Q. I believe you said that you had been in Washington at that time for approximately one week?

A. Yes.

Q. And this was a Friday, the day you fell, was it not?

A. Yes.

Q. Is my understanding correct that you arrived in Washington perhaps the preceding Saturday? Something like that?

A. Yes.

Q. You stayed over at the Marriott Key Bridge Motel, is that correct?

A. Yes.

A. Yes.

Q. You lied?

A. Yes.

Q. It was rather cold that morning, wasn't it?

A. Very cold.

Q. Below thirty-two degrees?

A. Yes.

Q. You know that?

A. It was very cold.

* * *

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Q. Say the patch of ice was a rectangular piece of ice. It went across the entire width of the sidewalk, as I understand it. About what distance was it in its other dimension?

A. I really don't remember.

Q. You don't recall?

A. No.

Q. Do you recall if it looked more like a combination of snow and ice or if it looked like a puddle perhaps that had frozen over?

A. It was an uneven patch of ice. There was ridges and it was not a smooth slick of ice. It was a thick and uneven patch of ice.

Q. Thick and uneven as opposed to smooth?

A. Yes.

Q. Is your present recollection?

A. Yes.

Q. Did you happen to notice that spot on your way up?

A. I noticed the entire-- the general look of the walk-way, not that entire spot -- I mean, that particular spot.

Q. On the way up, then, your attention wasn't drawn to this particular spot but you did walk across it?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Is there any reason for us to suppose that it might have changed its character in that hour that you were up there in the Monument, or was it the same when you came down as it was in fact when you went up?

A. I have no idea. I assume it was the same as it was.

Q. I believe you said that you had been in Washington at that time for approximately one week?

A. Yes.

Q. And this was a Friday, the day you fell, was it not?

A. Yes.

Q. Is my understanding correct that you arrived in Washington perhaps the preceding Saturday? Something like that?

A. Yes.

Q. You stayed over at the Marriott Key Bridge Motel, is that correct?

A. Yes.

Q. And it snowed several days during that week that you were in Washington, did it not?

A. Yes, I think so.

Q. Can you recall whether or not there was any snow along the sides of the walkway that you used to lead, to get up to the Monument and to descend from the Monument?

A. I think there was snow on the side of the walkway.

Q. Can you recall whether or not there would be what we would call new snow, fresh and clean looking, as opposed to rather older snow?

A. I really don't remember.

Q. You don't recall that?

51

A. No.

Q. Had you been to the George Washington Memorial before?

A. No.

Q. At a prior time, ever in your life?

A. We drove by it once but we had never visited the Monument.

52

Q. Do you recall Mr. Tausig asking you whether or not after you had fallen and were sort of sitting down on the ground almost crouching, looking at the area that caused you to fall?

A. Yes.

Q. Do you have a recollection of what the area looked like?

A. Yes, I do.

Q. Would you tell us what it looked like?

A. As I said, I watched my foot slip down along this ridge

of ice and that's when I noticed the area in which - where I fell because my foot was slipping along it and I was watching it slip as my body was slipping the other way. I was watching my foot follow this ridge of ice.

Q After you had fallen do you recall looking at the area
53 to get a better view of it?

A No, I don't. I guess I looked at the area generally but I was looking at my ankle.

Q The focus of your attention was on your foot rather than on the area that caused you to fall, is that correct?

A Correct.

Q So then perhaps it was just the instant while you were actually falling or slipping that you were viewing the area that your foot...

A Correct.

Q Is that correct?

A Yes.

* * *

REDIRECT EXAMINATION

BY MR. TAUSIG:

* * *

54 Q Now, when you were on the ground after you fell, in a
55 sitting position as you described it, and you said you looked at your foot, can you tell us whether you in any way took any other action with respect to your foot?

A Well, I felt a terrible pain and I went to grab my foot.

Q Alright. Now, when you grabbed your foot and when you were looking at your foot, were you able to see the ground at

A. Yes, I could see.

Q. You could see the walk at that time?

A. Yes.

* * *

96

Whereupon

ROBERT IRVING GOOD

was called as a witness by the plaintiff and after having first been duly sworn was examined by counsel and testified as follows:

* * *

Q. Officer Good, where are you employed, sir?

A. United States Park Police

Q. And were you so employed on December 30, 1966?

A. Yes, sir.

Q. Calling your attention to that date, directing your attention to that date, did you have occasion to be in the morning of that date in the Sixteenth Street parking area of the Washington Monument grounds?

A. Yes, sir.

Q. Will you tell us what happened while you were there, sir?

97

A. Well, I was flagged down by a sightseeing guide, Mr. David Kaplan. He motioned me to come over, which I went over. He told me about the icy conditions in the Sixteenth Street parking oval, which after I talked to him I made a check of the area.

At such time I went to Seventeenth Street and Constitution Avenue to the Lodge House and phoned the dispatcher by telephone and requested that sand be brought at this location.

Q Now, sir, when you said, you said Mr. Kaplan told you about -- what did you say about the Sixteenth Street parking area? I didn't get that word.

A Icy conditions.

Q Icy conditions. Now, was that the only place that Mr. Kaplan told you there was an icy condition?

A Yes, sir. At that time he just said that the conditions in the Sixteenth Street parking oval were icy, which I made a check of the area for myself.

Q Now, when you say "oval," what are you talking about, what area are you talking about?

A That's the Sixteenth Street parking itself.

* * *

98 Q Officer Good, when you talk about the Sixteenth Street Oval, are you talking about only parking area or walkways also?

A Well, the parking oval itself where the cars park to park to go to visit the Monument.

Q So as I understand it, it's your testimony that Mr. Kaplan told you about an icy condition in the parking area only?

A Yes, sir.

THE COURT: When you say the parking area only, do you mean the parking area for automobiles?

THE WITNESS: Yes; yes, your Honor.

* * *

Q Can you tell us whether you inspected any walkway at
99 that time?

A No, sir. I don't remember getting off my motor cycle and checking any other area out.

* * *

Q. Were you in my office, to the best of your recollection, and I took your deposition?

A. Yes, sir, I was.

Q. Now, do you recall telling me at that time that Mr. David Kaplan had advised you on the morning of the 30th of December 1966 that there was an icy condition?

A. Yes, sir.

* * *

101

BY MR. TAUBER:

Q. Now, Officer Good, in this deposition that you see is your deposition of September 7th, 1967--

A. Yes, sir.

Q. On page six, I ask you this question:

"Q. Now, you said a few moments ago it had been called to your attention that the walkways to the Washington Monument grounds were a little bit slippery. How was that called to your attention?"

And did you answer at that time:

"A. Well, they have a sightseeing, they have sightseeing guides that work around the area. If I am not mistaken I believe the gentleman's name was David Kaplan. Now, I wouldn't swear to that but I believe he works in the area of the Sixteenth Street parking lot soliciting for visitors -- I mean, you know, for sightseeing tours. He stated that--"

Mr. Shinnick then objected to the hearsay.

102

MR. SHAPIRO: And I object at this point to the hearsay.

BY MR. MUSIC:

Q Mr. Teusig says:

"Q Can you tell me what you remember?"

And the witness answers:

"A Well, he stated that there was ice on the parking lot and I made a check to check the sidewalk coming down from the north slope of the Monument to the parking lot, around the parking lot itself.

And like I say, I then went to Seventeenth Street on Constitution Avenue and made a call to the dispatcher, who in turn called the maintenance yard, and they had sand come out."

* * *

104

Q Now, Officer Good, my question was, after my reading you your answer in that deposition, my first question was: Was that the way you answered on September 7, 1967?

A Yes, sir.

Q Now, does that refresh your recollection as to whether on December 30, 1966, after Mr. Kaplan talked with you, that you examined the walkway leading from the Sixteenth Street oval up to, or nearly up to, the Monument itself?

A Well, I can't remember just exactly whether I walked all the way to the Monument. Like I say, I did drive around on the motorcycle around the area.

If it's in the deposition, I apparently got off and walked maybe part of the way up the walkway.

Q. Do you recall... I'm not quite clear on your answer. Are you saying that you think you may have, or you did, or you don't have any recollection of it?

105

BY MR. TAUBIG:

Q. Now, when you walked part of the way up the walkway, can you recall what you saw?

A. I don't know.

106

Q. Officer Good, I show you page forty of the deposition I took on September 7, 1967. You were testifying. I asked this question:

"Q. Can you recall when you went to the Washington Monument area that morning at approximately ten a.m. if you circled the area on your motor cycle?

"Is that your normal practice or do you get off and walk around or just how was it that you worked your beat?"

And the answer:

"A. Well now, we don't ride over the sidewalks unless there is an extreme emergency or something serious happened at the moment."

107

Excuse me, Your Honor, that should be at the "Monument".
". . . something serious happened at the

Monument. I would not ride up normally over the sidewalk unless I had an emergency to go up.

But that particular morning I circled through the parking oval. I stopped at the sidewalk and I walked part of the way up. "I noticed icy spots on the sidewalk and that's when I went off to make the phone call."

Now, Officer, having read my question and your answer to it, I ask you whether that refreshes your memory as to what occurred at the Washington Monument grounds after Mr. Kaplan talked with you?

A. Well, apparently, like I say, if it's in the deposition I apparently must have gotten off. It was more fresh in my memory then. I must have gotten off and walked up like the deposition says.

Q. And as the deposition says, is it also true that you saw icy spots, to the best of your recollection now?

A. Yes, sir.

Q. Now, do you in any way recall the nature of those icy spots?

A. Well, the best I can recall would be that it was not a solid sheet of ice, that it was just icy in spots.

Q. Now, do you recall whether, or does this refresh your memory as to whether you called for sand on that walkway?

A. Well, the best that I can remember is when I stopped at the Lodge House at Seventeenth and Constitution I called the dispatcher and said that there was sand needed in the area. I

can't remember whether I said any specific location or not.

Q. When you said, "in the area," which area are you talking about?

A. Well, that would be the Sixteenth Street parking oval and possibly the sidewalks leading up to the parking lot itself.

Q. Now, sir, I show you Plaintiff's Exhibit Number 4 for identification and ask you whether you can identify that photograph, the location of that photograph?

A. Yes, sir. It's the south end of the --- well, say the north end of the --- correction: the south end of the parking lot where the sidewalk comes down from the slope at the base of the Monument on to the parking oval.

Q. Now, is the partial area shown there of the parking lot and that sidewalk which is shown leading up to the Monument, is that the area you inspected after Mr. Kaplan talked to you?

A. Yes, sir.

Q. To the best of your recollection, on any other day did Mr. Kaplan ever call your attention to an icy condition in that area?

A. No, sir.

109

Q. He did not?

A. No, sir.

Q. This was the only day?

A. Yes, sir, this was the only day.

Q. And that was December 30, '66, is that correct?

A. Yes, sir.

* * *

111

Q. Would you read pages eight, nine, ten and eleven of the deposition, Officer Good?

MR. SUMMICK: If Your Honor please, the Officer is referring to pages eight, nine, ten and eleven.

THE WITNESS: Do you want me to read twelve?

BY MR. TAUSIG:

Q. No, that is sufficient. Now, Officer Good, I ask you whether this refreshes your memory as to what you saw in respect to the walk on December 30, 1966, as to the amount of the walk that was covered with ice?

A. What was that question, sir?

Q. I ask, having read pages eight, nine, ten and eleven of your deposition of September 7, 1967, whether that refreshes your memory as to the amount of the area of this walkway which is shown in Plaintiff's Exhibit Number 4 which you have looked at...

A. Oh --- yes, sir.

Q. How much of that walkway was covered with ice on December 30, '66.

A. Approximately a third.

Q. Alright, sir. Now, Officer Good, I want you to read page fifteen of your deposition.

BY MR. TAUSIG:

* * *

114 Q. Now, having read page fifteen, Officer Good, of your deposition, can you tell me whether that refreshes your recollection as to whether on December 30, 1966, you made a call for salt and sand to be put on the walkway which is shown in Plaintiff's Exhibit Number 4 for identification?

A. Yes, I did.

Q. Alright. Now, subsequent to that time, or excuse me---

after you made that call, can you tell us where you went?

A. Back to the Sixteenth Street oval.

Q. And how long did you stay there?

A. Oh, approximately fifteen minutes or so.

Q. Alright. Did there come a time when you left?

A. Yes, sir.

Q. Shortly after that? During that day?

A. Yes, sir.

Q. And did there come a time in the afternoon when you returned?

A. I am sure I did but I can't say for sure. I mean, that was on my boat and I'm sure I returned but I couldn't say just what time.

Q. Now, Officer Good, I ask you to read page eighteen of your deposition and ask whether that refreshes your memory on the question I just asked you as to whether you returned that afternoon? Does that refresh your memory?

A. Yes, sir.

Q. And did you return that afternoon?

A. Yes, sir.

Q. And what did you notice about the conditions of the walk at that time?

A. They had been sanded.

* * *

CROSS EXAMINATION

* * *

BY MR. SHINNICK:

Q. When was the first time, Officer Good, to the best of your recollection now, that you first heard that someone had

fallen out on the Washington Monument grounds on December 30th, 1966?

A. Well, I heard on the police radio for the cruiser to respond to the George Washington Hospital to take an injury report, but I didn't know that someone had broken a leg or anything like that until I was approached by Mr. Jack Hobbs of the National Park Service.

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Q. Was that about April '67 to the best of your recollection?

A. Yes, sir.

Q. Some approximately four months after the accident did in fact occur?

A. Yes, it was quite a while after this accident had happened.

Q. Is my understanding correct also that the date of this deposition that Mr. Tausig took, September 7, 1967, is that correct?

A. Yes, sir.

Q. Now, Officer Good, do you have any recollection right here this afternoon, do you have a present recollection of the events that transpired on the date of December 30, 1966?

A. You mean in what respect?

Q. I mean sitting here right now, can you think back in your mind and remember the day December 30, 1966 -- do you remember what the weather was like, what the conditions were like, who you talked to, et cetera?

A. No, I can't remember.

Q. Is my understanding then correct that when you made

your responses to Mr. Tausig's questions, the one he just asked you, you were in fact repeating the materials that you had read from the deposition that was before you?

A. Yes.

117 Q. Is that correct?

A. Yes.

Q. And you do not have any present recollection today of the events the way they were on December 30th?

A. No. I can remember Mr. Kaplan advised me of the icy conditions --- that's all.

Q. You can remember that much, is that correct?

L. Right. I can remember him mentioning for me to come back because I had driven down Constitution Avenue and he had mentioned for me to come back, and I drove back to see what he wanted, and that's at the time he told me about the icy conditions.

Q. Do you have any recollection of anything that happened on that day in addition to your conversation with Mr. Kaplan?

A. No, sir.

Q. None whatsoever?

A. None.

* * *

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REDIRECT EXAMINATION

BY MR. TAUSIG:

Q. Officer Good, Mr. Shinnick asked you about a statement that you had made in April of 1967. Do you remember that? Do you remember him asking about that question about Mr. Hobbs getting a statement from you?

A. Yes.

122

(Plaintiff's Exhibit Number 12
was therupon marked for identifi-
cation.)

BY MR. TAUSIG:

Q. Now, without discussing the contents, Officer Good, I ask you whether you can identify that document?

THE COURT: You can answer that yes or no.

THE WITNESS: Yes. I believe this was a document--

BY MR. TAUSIG:

Q. You can identify it, is that right?

A. Yes.

Q. Now what is it, sir?

* * *

THE WITNESS: No, it's a statement taken by Mr. James Lyon, also employed by the National Park Service.

BY MR. TAUSIG:

Q. From whom?

A. From me.

Q. Will you look at that and say whether you signed it at that time?

123

A. Yes, sir, I did initial it.

Q. Alright, sir.

* * *

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Q. Now, Officer Good, I ask you whether that statement contains the information you gave in April of 1967, on April 6, 1967 which you signed?

A. Yes, sir.

Q. And at that time were you telling your superiors, per-

sons who took that statement, the truth as you remembered it at that time?

A. Yes, sir.

Q. And they witnessed your signature, did they not?

A. Yes, sir.

* * *

125

BY MR. TAUCIG:

Q. Officer Good, have you read this statement today?

A. No, sir.

Q. Would you read it and then I would like to ask you a question.

* * *

MR. SHANNICK: Your Honor, during the recess, Mr. Taucig and I, in the interests of saving the court's time, have agreed upon a stipulation, and if I might I could read it to the court.

THE COURT: Alright.

MR. SHANNICK: "On December 30, 1966, at eleven-thirty-three a.m., Officer R.I. Good of the United States Park Police, requested the radio dispatcher at the United States Park Police Headquarters in the District of Columbia to hold Officer Good out of service while he made a phone call from the phone at Seventeenth and Constitution Avenue North West; and "that at eleven-forty-three a.m. on the same date, Officer Good advised the radio

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dispatcher that he had come back on service."

Thank you, Your Honor.

THE COURT: Alright.

MR. TRUSLG:

Q. Now, Officer Good, during the recess did you read Plaintiff's Exhibit Number 12 which is your signed statement of April 6, 1967?

A. Yes, sir.

Q. Having read that, and having heard this stipulation, will your memory refreshed as to what David Kaplan told you on the morning of December 30, 1966, prior to eleven-thirty-three a.m.?

A. To what now --- say that again, sir.

Q. Having read your statement of April 6, 1967---

A. Yes, sir.

Q. Having heard Mr. Shinnick read the stipulation about your phone call at eleven-thirty-three a.m., does that refresh your memory as to what Mr. David Kaplan told you prior to eleven-thirty-three a.m. on December 30, 1966?

A. Told me about the icy conditions.

Q. Alright. Now, does reading this statement refresh your memory what you actually did on December 30 after Mr. Kaplan had this conversation with you?

127

A. Yes.

Q. Alright. Now, what did you do?

A. Made a check of the area.

Q. Did that check include the sidewalk which is shown on Plaintiff's Exhibit Number 4 for identification?

A. Yes, sir.

Q. Does reading this statement you made on April 6, 1967, refresh your memory as to what you said when you made this telephone call referred to in the stipulation?

A. What I said to the dispatcher?

Q. Yes.

A. I just called him and advised him of the icy conditions and asked him if we could get some sand.

Q. Where?

A. In the Sixteenth Street parking oval area.

Q. Did that include the sidewalk shown on Plaintiff's Exhibit Number 4?

A. Yes.

Q. Now, is there any doubt about your recollection of that at this time?

A. I don't believe so.

Q. Now, on Mr. Shinnick's examination, he asked you whether there were other tour guides in this area. Do you remember that question?

A. Yes, sir.

Q. And you answered, "Yes." Is there any recollection in your mind which tour guide told you of the icy conditions on December 30 in the Sixteenth Street parking area and this sidewalk?

A. It was Mr. Kaplan.

Q. It could not have been any of the other guides to the best of your knowledge?

A. I don't believe so.

Q. Has any other guide ever told you of any dangerous condition of ice in this area?

A. No, sir, not to my knowledge.

MR. DAUGLASS: I have no further questions.

RUCROSS EXAMINATION

BY MR. SUMMICK:

* * *

129 Q. Do you recall where it was that you were physically situated when you had a conversation with David Kaplan?

A. That was right at the -- well, there's an island in the parking oval and it was at the north end of the parking lot. In other words, it would be that deep end right down there.

* * *

Q. Is my understanding correct that immediately after you talked to David Kaplan, say within a minute or two, you called the Dispatcher and asked to be let out of service for the purposes of making a telephone call?

A. Well, it would have been a little bit longer than that.

Q. Could you tell us how long it would have been, to the best of your recollection?

A. Say ten to fifteen minutes.

Q. Ten to--

A. Ten to fifteen minutes, because I checked the area.

Q. Now, when you say you checked the area, will you tell us what you did, to the best of your recollection?

A. Well, I came around the parking oval on the motor cycle and stopped at the south end, and I checked the sidewalk area leading to the Monument.

* * *

Q. Is my understanding correct that when you say you checked the sidewalk, that you checked this area of the sidewalk down here close to the south end of the parking lot?

A. Yes, sir.

Q. I'll show you what's been marked, Officer Coed, as Plaintiff's Exhibit Number 4 for identification, and ask you if you would please take this pen and mark on that picture where it was that you checked -- again, to the best of your recollection.

* * *

131 THE COURT: Just a minute. Where is your mark?

MR. SLIFNICK: It's the blue line, Your Honor.

THE WITNESS: It comes up the center of the side-walk...

* * *

Q. Do you have a recollection, present recollection, can you remember now, what that sidewalk looked like to you when you examined it on December 30, 1966?

A. Well, it had some icy spots. It had melted some. There was water and some icy spots. It had melted some during the day from the sunlight.

Q. Would my understanding be correct then that rather than it being a sheet of ice it was spitious (sic), patches of ice and patches of water and melting ice, whatever you want to call it?

132 A. Yes, more or less -- just spots of ice. Not a solid sheet of ice covering the whole walkway.

Q. It was not a solid sheet. It was patches of ice. Is that correct?

A. To the best of my recollection.

Q. Alright. And when you testified in response to Mr. Tafsig's questions about a third of the area, a third of the walk being covered, did you in fact mean that approximately a third

of the walk was covered with patches of ice rather than solidly covered with ice?

A. Yes.

Q. Now, we have stipulated that you put the call in at approximately eleven-thirty-three a.m. I believe we stipulated that that was the time you called the dispatcher and asked to go out of service?

A. Yes, that's correct.

* * *

133 Q. Now is my understanding correct that you called the dispatcher at that time by phone?

A. Yes, sir.

Q. And told him that you had noticed ice on the sidewalk in the parking lot and requested him to get someone down there with sand?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Is my understanding also correct that you called the dispatcher on the radio at eleven-forty-three and told him you were now back into service?

A. Yes, sir.

Q. Could we then fix the time of your conversation with David Kaplan as being somewhere between eleven-fifteen and eleven-thirty-three, approximately?

A. Approximately.

Q. Approximately fifteen minutes before you called?

A. Yes, sir, approximately that.

Q. Would you say that that would be the largest space of

time that night have expired? Is that a fair estimate of the amount of time you spent before calling in for the sand?

A. - Yes, sir.

* * *

134 Q. Officer Good, we know from testimony already in this case that sometime during that hour --- we will say between eleven a.m. and twelve noon --- on the date of December 30th, Mrs. Bernstein in fact fell out on that walk. Did you have any knowledge of her fall that day?

A. No, I didn't.

Q. You didn't see her fall?

A. No, sir.

Q. Mr. Kaplan did not tell you she had fallen?

A. No, sir.

Q. Is my understanding correct that you heard a radio run to the effect she was at G.W. Hospital?

A. I heard a radio run to pick up an injury report. I didn't know who it was. It just said pick up an injury report for I think it was cruiser 401 at the time, pick up an injury report at the George Washington Hospital. It occurred at the Washington Monument.

Q. And do you know who in fact was in cruiser 401 on that day?

A. Yes, sir, that was Officer Frank Stevens.

* * *

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FURTHER REDIRECT EXAMINATION

BY MR. TAUSIG:

Q. Officer Good, you made a mark on Plaintiff's Exhibit

sticker 4 for identification, indicating how much of the walkway shown on that exhibit that you examined on that day and you say that's what you definitely recollect. Is that correct?

A. Yes, sir, to the best of my knowledge.

Q. Alright. Now, I would like you to read your deposition that I took on September 7, 1967, starting at the bottom of page forty-one and reading page forty-two.

Have you read pages forty-one and forty-two?

A. Yes, sir.

Q. Now, I ask you whether that refreshes your recollection as to as to how far up the walk you walked and inspected on December 30, 1966, after Mr. Kaplan told you about the icy condition?

A. Yes, sir. I've seen the deposition here says I walked almost to the top to the circle at the base of the Monument.

Q. Does that refresh your memory that you did walk almost to the top?

A. Yes, sir.

Q. And was that entire walk, almost to the top, what you said was one-third in icy spots?

A. Yes, sir.

Q. So as I understand it, it would have been more accurate if you had marked this picture with this blue line almost up to the base of the Monument, is that correct?

A. Yes, sir.

* * *

FURTHER RECROSS EXAMINATION

BY MR. SHIENICK:

Q. Officer, I noticed while reading the deposition over your shoulder that it contained your ther recollection of how much time elapsed between the time David Kaplan talked to you and the time that you put in your call to the dispatcher.

Would you take another look at it please and I ask you if that will refresh your recollection as to how much time elapsed between the time that you talked to David Kaplan and the time you called the dispatcher?

MR. COUSE: What page is it?

* * *

BY MR. SURNICK:

Q. The part I was calling your attention to, Officer Good,
137 is at the bottom of page forty-one:

"Q. Can you tell us the approximate period of time you viewed the sidewalk area -- was it approximately thirty seconds, ten minutes -- what is your best recollection of that?

A. Well, I would say maybe approximately five to ten minutes because I did... well, I would just say approximately five minutes because I got off the motor cycle.

I walked up to the sidewalk and checked around and came back down."

So would you say, then, Officer Good, that the amount of time you spent examining the area was approximately five minutes?

MR. TAUSIG: Five to ten minutes, he said.

MR. SHANNON: I'll read it again. Answer, on bottom of page forty-one:

"A. Well, I would say maybe approximately five to ten minutes because I did... Well, let's say approximately five minutes because I got off the motor cycle, I walked up to the sidewalk and checked around and came back down."

Is that correct?

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- A. Yes.
 Q. Approximately.
 A. Approximately. I would say approximately five minutes.

Could be either way.

* * *

Whereupon

DAVID KAPLAN

was called as a witness by the plaintiff and after having first been duly sworn was examined by counsel and testified as follows:

DIRECT EXAMINATION

BY MR. TAUSTE:

* * *

- Q. What is your occupation, Mr. Kaplan?
 A. A guide.
 Q. What type of a guide?
 A. A sightseeing guide.
 Q. Where?
 A. Mostly at the Washington Monument grounds at Sixteenth and Constitution Avenue.
 Q. Now, sir, how long have you been a guide at that loca-

139

A. Over twenty years.

Q. Directing your attention to December 30, 1966, could you tell us whether you had a conversation on that day, on that morning, with an Officer R.L. Good of the Park Police?

A. Yes, sir, I did.

Q. And have you seen Officer Good in this courthouse today?

A. Yes, sir.

Q. You recognized him?

A. Yes, sir.

* * *

Q. Thank you. Now, sir, can you tell us the nature of the conversation that you had with Officer Good on that day?

A. I called him over and I told him, I said, "Officer, look at that cross walk leading to the Washington Monument. It's full of ice and it's a shame. It has been three days in that condition that they didn't do anything at all about it."

Q. Now, when you say you called him over, where were you, sir, when you called him over?

A. I was on the parking lot at Sixteenth and Constitution Avenue.

Q. I show you Plaintiff's Exhibit 4 for identification and ask you to look at it, and then after you have looked at it I would like to ask you a question.

A. Yes, sir.

Q. Can you identify the scene shown in that photograph?

A. Yes, sir.

Q. And can you tell us whether that photograph shows the place where you had the conversation with Officer Good?

A. Yes, sir.

Q. And will you make a little mark, a circle, on this photograph, indicating the place where you had the conversation with Officer Good?

A. Right here, sir, approximately.

Q. That's in the parking lot?

A. Yes.

Q. That's the approximate place -- that's shown by a circle? Is that correct?

A. Yes, sir.

Q. Now, sir, on the two days prior to the time you had this conversation with Officer Good, where were you during those days?

A. I was at the parking lot at Sixteenth and Constitution Avenue.

Q. What were you doing there, sir?

A. Looking for sightseeing visitors.

Q. And why did you want to see them?

A. To take them on a tour.

Q. Alright. Now, during this time, the two days prior to the time you had the conversation with Officer Good, did you have occasion to examine the condition of the walkway shown in Plaintiff's Exhibit 4 for identification?

A. Yes, sir.

Q. And what was the condition of the walkway, sir?

A. It was icy.

Q. And can you tell us how much of the walkway was icy?

A. Well, from the middle, approximately the middle of the

parking lot where I was standing as far as I could see up on the hill.

Q. There was ice on the sidewalk?

A. Ice.

Q. Can you tell us whether -- give us a better description as to whether there were spots, splotches, complete coverage?

A. Well, certain places I could see little spots like.

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THE COURT: You could see what?

THE WITNESS: I could see little splurts (sic) like.

BY MR. TAUSIG:

Q. And what else did you see, sir?

A. And then ice.

Q. Well when you say, "then ice," were other conditions in the walk different from those little splurts or splotches you were talking about?

A. No, sir.

Q. You mean it was all spots?

A. All ice.

Q. All ice?

A. Right.

Q. When you say, "all ice," you mean the walk was completely covered--

A. The walk was covered with ice. I didn't see any bare spots at all. In other words, nothing but ice.

Q. Now, Mr. Kaplan, how long on each of these three days we are talking about -- that is, the day you talked to Officer Good and the two preceding days -- how long did you stay at this site shown in Plaintiff's Exhibit number 4 for identification?

A. Approximately about eight-fifteen a.m. until about two-thirty p.m.

Q. On each day?

A. Yes, sir.

143 Q. During that time did you get any business?

A. No, sir.

Q. And can you tell us whether you, to the best of your recollection, there was snow on the ground?

A. It was snow on the ground.

Q. And where was there snow on the walk on these days?

A. I didn't see any snow on the walk.

Q. The walk was clear of snow, is that correct?

A. Right.

Q. Did you see any snow beside the walk?

A. The walk on the right hand and on the left side of the walk.

Q. Was that in your observation just as the snow had fallen on the ground or had it been shovelled?

A. I did not see anybody cleaning or shovelling the snow in those three days.

Q. Now, when you -- let me ask you this question. In those three days up to the time you talked to Officer Good on the morning of December 30th, did you see any salt or sand on these walks?

A. No, sir.

Q. During the time that you were there from eight-fifteen a.m. till about two-thirty p.m. on the three days in question, did you see anybody dressing this walk with salt or sand?

A. No, sir.

144 Q. Prior to these three days, let's go back over the time that you have been a guide at this location, have you seen salt and sand put on this walk?

A. Yes, sir.

Q. Have you seen how the salt and sand get off the walk?

A. Well--

Q. You can answer that yes or no.

A. I didn't understand that question, sir.

Q. From your personal observations, do you know, during this period of time you have been a guide, how this salt and sand that you have seen put on the walk gets off?

A. Gets off?

Q. Yes. Have you seen anybody remove it?

A. The snow?

Q. No, the salt and sand.

A. No, sir.

Q. Have you seen it washed away?

A. Occasionally.

Q. By what, sir?

A. Rain.

Q. When you had your conversation with Officer Good as you have just related, what did he do that you saw?

A. He told me that he was--

Q. Not what he told you -- what did you see him do, if anything?

145 A. He got on a motor cycle.

Q. Got--

A. On his motor cycle. He was a motor cycle police.

Q Yes, sir.

A And he drove away and he said he will take care of it.

Q Before he drove away, did you observe him do anything?

A He looked around.

Q Where did he look, sir?

A Up on the hill, up on the crosswalk, like, to the entrance to the Monument, the Washington Monument.

Q And when you say the entrance to the Washington Monument:

A Sixteenth Street entrance.

Q Are you talking about some entrance up here at the base of the Monument?

A No, right here, like. This entrance right here, sir.

Q Alright. Well, tell us what you actually observed him do, where you saw him walk in relation to Plaintiff's Exhibit 4 rather than "right here, sir," because the record won't reflect what you are talking about.

A He walked down from approximately over here where I was talking with him, just around this direction over here, just about over here.

Q He walked--

A He walked from here a short distance from the parking lot to the Kiosk and just approximately over here and then he walked back.

Q Alright. So that the record will reflect your answer accurately, is it your answer that he walked from the circle that you've drawn on this Plaintiff's Exhibit--

A Yes.

Q. ---indicating the place you talked with him--

A. Yes.

Q. Just a moment. -- to the building on the right hand side, a little shed which is called the Kiosk?

A. Yes.

Q. And some what slightly beyond?

A. Right.

Q. That's what you say him do?

A. Right, correct.

Q. Then what did you see him do?

A. Nothing. He went away.

Q. Well, did you see him get on his motor cycle?

A. Yes, sir.

Q. Alright. Now, you remained there until approximately two-thirty that day?

A. Yes, sir.

Q. Can you tell us whether while you were there and after you had this conversation with Officer Good, you actually saw salt and sand put on this walkway?

147 A. Yes, sir, after.

Q. How long afterwards? Do you have any accurate knowledge or recollection?

A. I would say approximately about an hour, between forty-five minutes to one hour approximately.

MR. TAUSIG: Thank you very much. I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. SHINNICK:

Q Mr. Kaplan, I just want to get your last answer straight on the record. I was writing it down and I didn't get it complete.

A Am I correct in understanding that between forty-five minutes and one hour after you had talked with Officer Good, you saw sand on the walkway in question?

A Right.

Q Did you see anyone put the sand down or did you just happen to notice it there?

A I noticed that a truck came over.

Q Yes, sir.

A I don't know how many men it was on the truck but I have seen a truck put the sand on the crosswalk.

Q And that was within forty-five minutes to an hour?

A Yes, sir.

Q Mr. Kaplan, when you testified today, sir, are you testifying from your recollection? Can you actually think right now of what the situation was like back in December 30, 1966?

A Now, you are referring to what, sir? I remember the statement I made to the Officer. I remember the crosswalk.

Q Today -- you have a present recollection?

A Yes, I remember what happened at that time by what I observed at that time.

Q Sitting there in the witness chair you can see in the mind's eye yourself talking to Officer Good?

A Yes, sir.

Q And him walking up the sidewalk?

A Right.

Q Now, on that picture shown to you by Mr. Tausig, there

was a blue line, if you might recall. Do you recall that blue line?

A. I noticed a line there; yes. I noticed the circle that I made.

Q. Do you recall seeing also a blue line there on the photograph?

A. Yes, sir.

Q. You do recall seeing a blue line?

A. Yes, sir.

Q. Now, was the blue line going down the sidewalk that you referred to?

A. Yes, sir.

Q. It was. Is that blue line the approximate distance
149 that Officer Good walked?

A. Approximately, yes, sir.

Q. Approximately -- within a few feet, five or ten?

A. Right.

Q. Shortly beyond the kiosk?

A. That's correct.

Q. Now, there's another point I wanted to check with you, Mr. Kaplan, as to your recollection of the character of the ice out there. This is before you talked to Officer Good. You say you observed it and you observed the entire walkway leading up to the Washington Monument as one sheet of ice?

A. From a distance, yes, sir.

Q. From a distance of how far?

A. In other words, from where I was standing looking up to the crosswalk leading to the entrance there, Sixteenth Street entrance.

Q Yes, sir.

A I have seen nothing but ice.

Q Did it look hazardous to you?

A Yes, sir.

Q It looked dangerous?

A Yes, sir. That's why I made a remark to the Officer.

Q Did you see any people walking on it?

A Well, I have seen a few people walking, yes. I have seen a couple of people walking. That's what made me think about 150 how hazardous it is to walk at the present time, or at that time.

Q And you saw people walking on it before you talked to Officer Good?

A Yes, sir, a couple of people.

Q Now, did you see any people walking on it while you were talking with Officer Good?

A No, sir.

Q Did you see any people walking on it between the time you talked to Officer Good and the time the men came with the sand?

A A few people, yes, sir.

Q You did see them?

A Yes, sir.

Q Were you on the premises, on the parking lot itself, for the period of time, we'll say approximately eleven a.m. that morning to approximately twelve a.m. that morning?

A No. That morning I was there from eleven a.m. until approximately two-thirty or two-fifteen.

Q I just wanted to check in particular to see if you

were there between the hour, between eleven and twelve a.m.

A. I was there.

Q. On the parking lot?

A. Yes, sir.

Q. Did you see anybody fall on the walkway?

A. No, I did not, sir.

151 Q. Did you have occasion to observe the walkway during this hour, eleven to twelve?

A. No.

Q. What were you doing on the parking lot that caused you not to observe the walkway?

A. I was just trying -- sitting over there and waiting some people to come in, you know, that I would be able to sell them a sightseeing tour.

Q. Had somebody fallen on the walkway, would you have noticed it?

A. Yes, sir.

Q. You would have. So it is your statement then today that nobody fell on the walkway between eleven and twelve a.m. that morning?

A. I did not see anybody fall on there, no, sir.

Q. And you would say that had someone fallen, you would have seen them?

A. Well, maybe yes, maybe no, because many of times under this kind of weather condition I jump in a car for a few minutes.

Q. Right, but your car would be on that parking lot, wouldn't it?

A. On the parking lot.

Q. I will show you this picture again and ask you to take a look at what appears to be a black Mustang parked here close to the snow fence. Do you recall that? And I believe the circle 152 on the photograph represents where you said you were standing.

A. Approximately.

Q. Is that true?

A. Yes, sir.

Q. Would you tell us the approximate distance between that circle where you were standing and the black Mustang?

A. Oh, I would say approximately about a hundred and fifty feet.

Q. A hundred and fifty feet?

A. In my judgment, approximately.

Q. Fifty yards -- about half the length of a football field, something like that?

A. Right.

Q. Now, did you have a car on that parking lot?

A. Yes, sir, I did.

Q. Do you recall where your car was parked in relation to where that black Mustang was?

A. On the opposite side, not on the same side. Where I made that circle, my car was parked not far from there.

Q. See if we can do it this way, Mr. Kaplan. Would you mark in approximately where your car was parked?

A. About right here and on this side over here. I was standing here and my car was over here.

Q. Would you make, say, a rectangle with an 'X' in the middle of it to show where your car was parked. Fine.

153 MR. SPERNICK: Right the record reflect that the witness has marked in blue ink on the photograph an 'X' with a circular rectangle (sic) around it to represent where his car was parked that morning.

THE COURT: Yes.

BY MR. SPERNICK:

Q Now, Mr. Kaplan, is my understanding correct that that morning you didn't get any business?

A Right.

Q Is that correct?

A That's correct, yes, sir.

Q And is my understanding also correct that that morning you spent your time either sitting in your car or standing on the parking lot in approximately where that circle is?

A That's right.

Q Did you have occasion to see two men helping a woman or carrying a woman that morning?

A No, sir.

Q You did not?

A No.

Q You know, Mr. Kaplan, do you not, that it snowed fairly often the week immediately preceding this day in question, is that correct?

A Well, yes, it was snowing, but I don't remember whether it was snowing those two or three days that --- the statement I made on the 30th---

Q I'm not asking you about that now. I am just asking you if you have a recollection--

A. Yes, sir.

Q. --Of whether or not it snowed--

A. Yes, sir.

Q. --Prior to that Friday?

A. Yes, sir.

Q. It had?

A. Yes, sir, it did.

Q. And on Friday some of that snow that had fallen previously remained on the ground?

A. Right.

Q. Is that correct?

A. Yes, sir.

Q. Is it also correct, Mr. Kaplan, that no snow was on the sidewalk leading to the Monument?

A. I did not see -- I saw ice but not snow

Q. You did not see any snow, is that correct?

A. Yes, sir.

Q. Had there been snow you would have seen it, is that correct?

A. Right.

Q. I couldn't hear you, sir.

A. Yes, that's correct.

155 Q. And as I understand, your testimony has been that on the day before -- Thursday -- the day before that, Wednesday -- and the day before that, Tuesday, of that week, you were on that parking lot approximately from eight-thirty or so in the morning until approximately three o'clock in the afternoon?

A. Two-thirty.

Q. And you did not have any business?

A. Right.

Q. Did not have any tourists?

A. Right.

Q. So you of all people -- you were on those premises, physically present at all times three days preceding the day in question.

On any one of those three days, Mr. Kaplan, did you see a crew, maybe one or two men, maybe more, come up this sidewalk with a snow plow to move the snow off it -- just yes or no.

A. What I want to know, sir -- are you referring to the third day?

Q. No, sir. Any one of these four days.

A. I did not see it.

Q. Tuesday, Wednesday, Thursday, Friday?

A. I did not see it.

Q. You did not see it?

A. No, sir.

Q. Did you see any men in a truck?

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A. No, sir.

MR. TAUSIG: Just a moment--

MR. SHINNICK: I haven't finished my questioning.

MR. TAUSIG: I don't want to break in but I don't want the record to become confused.

He has talked on direct examination about December 30th, Your Honor, and two days before. Now Mr. Shinnick has just introduced the question about Tuesday, Wednesday, Thursday and Friday, which is four days.

MR. SHIMMICK: I believe that's well within the limits of my cross examination.

Q. Friday was the day in question, Your Honor, and as I understood Mr. Kaplan he was actually physically present on the premises for the three preceding days. In addition, he was there on that Friday.

THE COURT: Yes.

MR. SHIMMICK: Fine.

BY MR. SHIMMICK:

Q. Mr. Kaplan, on those three preceding days, preceding Friday -- by that I mean Tuesday, Wednesday and Thursday -- did you see any men come up this sidewalk in a truck and sprinkle sand?

A. Sir, are you referring to those three days after it happened?

Q. Before.

157

A. Before?

Q. Yes, sir.

A. I don't recall.

Q. You don't recall?

A. No, sir.

Q. So what you are saying is they may have, they may not -- you don't know?

A. No.

Q. But you were on the premises?

A. I was.

Q. Definitely?

A. Yes, sir.

Q. And during those three days preceding the day in question, did you see people using the sidewalk to go up and down from the Monument?

A. Not too many -- a few.

Q. You saw a few?

A. Yes, sir.

Q. Ten, fifteen?

A. During the day, sir, or--

Q. During the day from the time you were there at eight-thirty or so--

A. More than ten or fifteen, sir.

Q. Fifty?

A. Approximately about forty, I would say.

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Q. Forty?

A. Forty or forty-five approximately.

Q. Would that have varied on those days or would that be approximately constant?

A. Varied -- one day a little bit more, one day less.

Q. Some days it might have been twenty-five, some days it might have been seventy-five?

A. Right.

Q. Did you see anybody fall or slip?

A. No, sir.

Q. Did you see anybody have any trouble going up and down that walk?

A. Yes, sir.

Q. On any one of those days?

A. Yes, sir.

Q. Which one of those days?

A. In particular, on the second day.

Q. This would be Wednesday?

A. And also on the third day....

Q. This was--

A. Because I observed people holding on very tightly when they were walking. They were walking very, very carefully and walking cautiously.

Q. This would be Thursday?

A. Right.

159 Q. So Wednesday and Thursday you observed people having trouble. Friday you didn't observe anyone having trouble?

A. Friday the same thing. People had trouble walking on that ice there.

Q. On Friday now we are talking about?

A. That was the third day.

Q. No, sir. Friday is the fourth day.

MR. TAUSIG: That's what I am objecting to, Your Honor, because--

MR. SHINNICK: It's not objectionable. If I misunderstood him I will certainly go back--

MR. TAUSIG: Let's find out. We're talking about the second day--

MR. SHINNICK: Mr. Tausig, may I ask the questions?

MR. TAUSIG: Surely.

BY MR. SHINNICK:

Q. Think of Tuesday, Wednesday, Thursday and Friday of that week.

A. Yes, sir.

Q. As I understand your testimony, you were physically present--

A. Right.

Q. ---On the premises, on this parking lot, on each one of those four days?

A. Right.

160 Q. Is that correct?

A. Yes, sir.

Q. On Tuesday---

A. Yes, sir?

Q. ---Did you see anyone slip and fall?

A. No, sir.

Q. See anyone in any trouble?

A. Not trouble --- trouble walking up or--

Q. Yes, sir --- walking up or down.

A. Walking up, yes, sir.

Q. You saw people on Tuesday having trouble?

A. Right.

Q. Did you see anyone on Wednesday having trouble?

A. Yes, sir.

Q. Did you see anybody on Thursday having trouble?

A. Yes, sir.

Q. Did you see anybody on Friday having trouble?

A. No trouble.

Q. No trouble on Friday?

A. No, sir.

Q. On Tuesday did you see any people come by with the snow

plow and plow that walk?

A. No, sir.

Q. Did you see any people come by on Tuesday with a sand truck and sand that walk?

A. I did not see it, sir.

Q. Do you know whether or not it snowed on Tuesday?

A. That was the first day -- Tuesday, Wednesday, Thursday -- yes, I believe it did snow.

Q. It snowed. On Wednesday was that snow removed from the walk?

A. Not to my knowledge, sir.

Q. Do you have any present recollection as to whether or not it was removed on Wednesday?

A. No, sir, I don't.

Q. You don't know whether it was removed?

A. No, unless it was removed after I left.

Q. I didn't ask now if you saw it being removed. I asked you in fact had it been removed.

A. I don't know, sir.

Q. On Thursday, had it been removed?

A. I don't know.

Q. On Friday had it been removed?

A. Friday -- you see, I'm getting mixed up with the three and four days. On the third day, when I made a statement to the Officer on that day it was removed and a sand truck came over and put sand on the ice.

Q. That's after you talked to the Officer?

A. Yes, sir, that was on the third day.

Q. No -- I'm talking about before that time. Had the sand

J62 been removed from that sidewalk before you--

A. I did not see it, sir.

Q. Did you see snow on that sidewalk before you talked to the Officer?

A. On the sides, yes, sir.

Q. You saw snow on the sides?

A. I saw snow on the top of the hill on the right and on the left.

Q. Did you see snow on that sidewalk?

A. I saw ice.

Q. There was no snow on that sidewalk?

A. Not to my recollection, no, sir.

Q. But there was snow on that sidewalk on Tuesday, to the best of your recollection?

A. Yes, sir.

Q. So it had been removed, to the best of your recollection, sometime between Tuesday and Friday, is that correct?

A. Could be. I wasn't-- I didn't--

Q. You didn't see it?

A. I didn't see it. I didn't observe it.

Q. You didn't see them removing it?

A. No, sir.

Q. But you knew it had been removed?

A. I didn't know it was removed. I didn't see it but evidently it had been removed because it wasn't there. I saw
J63 ice.

Q. That's correct, now, isn't it? It wasn't there so it had been removed?

MR. TAUSIG: Excuse me, Your Honor. What I stood up for before and this is happening again -- Mr. Shinnick asks a question and Mr. Kaplan is going yes or no, and the court reporter doesn't hear anything so we don't have anything on the record as to an answer.

BY MR. SHINNICK:

Q. Mr. Kaplan, can you tell me yes or no to this question: Isn't it a fact, sir, that sometime between Tuesday and Friday, before you talked to the Officer, the snow had been removed from the walk leading to the Washington Monument?

A. Again, I did not see it, sir.

Q. I didn't ask you that, sir. Isn't it a fact that it had been removed?

A. Yes, sir.

Q. Thank you, sir. Now, sir, do you work habitually anywhere other than the Washington Monument -- do you go to any other tourist attractions?

A. If I am on a call, yes, sir.

Q. Looking for tourists?

A. No, unless I have been called to pick up a certain group at a certain place.

Q. Do you keep any records either for tax purposes or licensing purposes or whatever?

A. I don't have a record of it, no, sir.

Q. You don't have a record?

A. No, sir.

Q. Did you make a record some time ago?

A. Quite a few years ago, yes, sir.

Q. Back in 1966, then, you did have a record?

A. No, sir.

Q. You didn't have a record?

A. No, sir.

Q. When you say you had a record quite a few years ago, when do you mean?

A. Oh, about ten or eleven years ago, something like that.

Q. You stopped record keeping ten or twelve years ago?

A. Yes, sir.

Q. Something like that?

A. Yes, sir.

Q. To the best of your recollection, during that week preceding the Friday when you talked to the policeman, did you go to any other monuments at any times during the day?

A. No, sir.

Q. You spent the entire eight or nine hour day, however long you worked, at the Washington Monument parking lot?

A. Yes, sir.

165 Q. Do you recall on Tuesday, Wednesday, Thursday or Friday of that week whether it rained?

A. I don't recall.

MR. SWINNICK: Don't recall. I have no further questions your Honor.

REDIRECT EXAMINATION

BY MR. TAUSIG:

Q. I would just like to get one thing clarified, Mr. Kavanagh.

If you assume that the day you talked with Officer

Good about the dangerous or icy condition on the walkway, shown in Plaintiff's Exhibit Number 4 for identification, was a Friday. I want you to answer that.

Were you physically present at the Washington Monument grounds from approximately eight-fifteen in the morning to two-thirty in the morning (sic), and also on Thursday, Wednesday, and Tuesday, preceding that Friday?

A. Yes, I was there.

Q. The same time each day, is that correct, sir?

A. Right.

MR. TAUSIG: I have no further questions, Your Honor.

166

I would suggest at this time that it might be helpful to the court if we introduced as a Plaintiff's Exhibit -- I don't know what the next number is -- the U.S. Weather Bureau report for the month of December 1966, which we have a stipulation on. It may be introduced without formal proof.

THE COURT: Yes.

(Whereupon Plaintiff's Exhibit

Number 13 was marked for identification.)

* * *

170

MR. TAUNIG: * * *

Your Honor, I have been authorized by Mr. Shinnick to advise the court that we spent some time here last night with Sergeant Coign of the Park Police who had brought the tape recordings of the calls made back and forth on the 30th.

THE COURT: Yes.

MR. TAUSIG: As a result of which we were able to enter into a stipulation and save the time of the court listening to the tapes and getting that information.

I am authorized to read this stipulation, so Sergeant Coign will not be here today.

THE COURT: Yes.

MR. TAUSIG: The stipulation is that:

"On December 30, 1966, at 12:01 p.m., Officer W.P. Stevens of the United States Park Police reported from patrol car number 401 to the United States Park Police Headquarters in the District of Columbia that a man had just advised Officer Stevens that the man's wife had fallen on ice at the Sixteenth Street oval and may have broken her ankle;

"that the man and his wife were in route to the George Washington Hospital in the District of Columbia; and that Officer Stevens go to the hospital later to obtain an accident report."

* * *

171

Whereupon

180

W. FRANKLIN STEVENS

were called as a witness by the plaintiff and after having first been duly sworn was examined by counsel and testified as follows:

DIRECT EXAMINATION

BY MR. TAUSIG:

Q. Officer Stevens, would you please state your full name.

A. W. Franklin Stevens.

Q. And where are you employed, sir?

A. United States Park Police in Washington, D.C.

Q. And on December 30, 1966, were you so employed?

A. Yes, sir.

Q. Now, Officer Stevens, directing your attention to December 30, 1966, can you tell us whether on that day you saw the two people sitting here, Mr. and Mrs. Bernstein?

A. Not--- No, sir.

Q. You did not see them?

A. I cannot say I saw them because I didn't know who they were. I did see a man operating an automobile stop next to my cruiser and advise me he thought his wife had just broken her ankle.

180 Q. Where was that, sir?

THE WITNESS: ***
 This was in the Sixteenth Street parking oval used by visitors to the Washington Monument.

BY MR. TAUSIG:

Q. And as a result of being so informed, what did -- were there any questions asked of you?

A. Asked of me?

Q. Yes.

A. The gentleman asked me where the nearest hospital was.

Q. And did you direct him to that hospital?

A. Yes, sir, I did.

182 Q. Now, at a subsequent time on that date, did you see the same lady and gentleman that you saw in the car?

A. I saw them-- Yes, sir.

Q. Alright. Where did you see them?

A. At George Washington Hospital.

Q. And why were you at George Washington Hospital?

A. It's a Force policy that all injuries occurring in the park system are treated at respective hospitals. It is the officer's duty to instigate an injury report.

Q. And did you do that?

A. Yes, I did.

Q. Alright. Now, did you have a conversation with the same lady and gentleman at that time?

A. Yes, sir.

Q. And did you learn their names?

A. Yes, sir.

Q. What were their names?

A. Mr. and Mrs. Bernstein.

Q. Now, at the time you talked with a Mr. and Mrs. Bernstein on December 30, 1960, did you make inquiry as to how the 183 injury to the lady occurred?

A. Yes, sir.

Q. And did you make inquiry -- well, tell us what you learned at that time?

A. That Mrs. Bernstein was walking from the Washington

Moment towards the parking area on the sidewalk, slipped and fell causing the injury to her ankle at a slope in the sidewalk.

Q. Now, did you make inquiries about landmarks that were familiar to you in that area which would enable you to identify approximately where she claimed she fell?

A. Yes, sir. At the bottom of the slope. The sidewalk from the Washington Monument runs-- continues down at an angle and it reaches a certain point and levels off, and at the point that approximately, best I could find, the area would have been somewhere at the intersection of the slope and the levelling off.

Q. Now, Officer Stevens, I show you Plaintiff's Exhibit Number 4 which has been admitted in evidence, which is a photograph of this area, and could you tell us exactly where you were describing? * * *

184

THE COURT: Did you go to this spot and look?

THE WITNESS: I went to the area and looked, yes, ma'am.

THE COURT: And looked for this place?

THE WITNESS: Well, it would have been impossible for me to tell the exact location without Mr. Bernstein or Mrs. Bernstein to so point it out.

THE COURT: Well, you spoke of the intersection of the slope in your testimony.

THE WITNESS: Yes, ma'am.

THE COURT: What does the slope intersect with?

THE WITNESS: The intersect, I am sure, is a bad word. I couldn't think of a better one. At a certain point the

185 sidewalk no longer continues at an angle, it levels off, and the intersection with the -- what I tried to describe by using "intersection" -- would be that particular point where the slope, the sidewalk comes down and no longer slants but levels off.

Q. Now, will you, taking by you, draw two parallel lines as to where you understood from your discussion with Mr. and Mrs. Bernstein that Mrs. Bernstein claims she fell.

186 THE WITNESS: *** I'm sorry. They stated that it was at the bottom of the slope and the two parallel lines that I have drawn, in between those two lines would be my conception of the end of the slope.

Q. Now, Officer Stevens, there has been read into evidence a stipulation, and I believe you were in the courtroom this morning when the proceedings began when I read that stipulation, which establishes that at 12:01 p.m. on December 30th, you reported from patrol car 401 that a man had just advised you that his wife had fallen on the ice at the Sixteenth Street oval and may have broken her ankle; and that they were in route to the George Washington Hospital in the District of Columbia; and that you would go to the hospital later to obtain an accident report.

187

Now, what I would like to ask you, Officer, is this: Prior to the time you went to the hospital to obtain the accident report, did you inspect the sidewalk area leading from the Sixteenth Street parking oval to the Monument as shown on Plaintiff's Exhibit Number 4 for identification?

A. Would you repeat that, please?

Q. Yes. On December 30, 1966, immediately after 12:01 p.m., and before you went to the hospital to obtain the accident report which you have already testified to, did you get out of

your cruiser, your automobile, and inspect this walkway shown in Plaintiff's Exhibit Number 4 in evidence?

A. No, sir.

Q. Alright. Now, did you do it at a later time that day?

A. Yes, sir.

Q. And was that later time after you had been to the hospital?

A. Yes, sir.

Q. And do you have any idea of the approximate time you left the hospital?

A. No, sir. ***

189 Q. Now, Officer Stevens, up to and including December 30, 1966, how long had you been on a boat or patrol that included the Washington Monument grounds?

A. Approximately three years.

Q. And was it one of your duties to inspect the Monument grounds for hazardous conditions?

A. Yes, sir. ***

190 Q. And did that include inspecting the walks around the Washington Monument grounds?

A. Yes, sir. ***

191 Q. Directing your attention, Officer Stevens, to the winter months of November and December of each of the three years we are talking about, how many times did you inspect the walkways around the Washington Nonument grounds, on an average?

A. Exact times, I couldn't answer.

Q. I asked you for an approximation.

MR. SHINNICK: Continued objection, Your Honor, as to the relevancy of trying to speculate.

THE COURT: I will overrule the objection on the grounds of irrelevancy.

THE WITNESS: I would guess once a day.

BY MR. TAUSIG:

Q. Now, during those two months, was there a normal practice that you observed for cleaning the walks of snow after each snowfall?

A. Yes, sir.

Q. And what was that normal practice?

A. A tractor type machinery with a snow plow blade would clear the walk of snow, and shortly thereafter, or at any other time that it would be called for by anyone, another crew would spread sand or salt on the sidewalks.

Q. Now, when the walks were cleared of snow -- or put it this way:

When this particular walk, shown in Plaintiff's Exhibit Number 4 in evidence, was cleared of snow, where would the snow be piled?

* * *

194 A. I would have no recollection.

Q. Well, where was it piled in November and December of 1966?

A. I couldn't say between those two months.

THE COURT: You don't know whether it was hauled away or spread somewhere in the area?

THE WITNESS: I don't remember.

BY MR. TAUSIG:

Q. Officer Stevens, I did give you last night, did I not, my copy of the deposition I took of your testimony on September

195 7th, 1967?

A. Yes, sir.

Q. And you read it over, did you not?

A. Yes, sir.

197

Q. Now, did I ask you the following questions and you made the following answers:

"Q. Now, as I understand it and understand your testimony, on the three years that you have been on duty with the Park Police and had the beat which includes the Washington Monument grounds, it has been your experience that as soon as it snows on the walks of the Washington Monument grounds, they are cleared thereafter. Is that correct?

A. Yes, sir.

Q. Alright. Has it been your experience that as soon as we have a snow that lays on the sidewalks at the Washington Monument grounds that the snow removal crews at Brentwood or East Potomac clear the sidewalks?

A. As soon as possible, yes, sir.

198

Q. Right. Now, it has been their practice to pile snow on both sides of this walk where Mrs. Bernstein says she fell, is that correct?

A. Yes, sir.

* * *

199

Q. Now, Officer Stevens,

did I on September 7, 1967, ask you the questions
that have just been read and did you make the answers that have
just been read?

A. If it's in the deposition. I don't remember the exact
questions you asked, any of them.

THE COURT: You don't remember any of these ques-
tions or any of these answers that have just been read to you?

THE WITNESS: No, ma'am.

BY MR. TAUSIG:

Q. Do you remember me taking your deposition?

A. Yes, sir, I remember going to the office but I--

Q. Now, having heard me read what I have just read to you
and even though you don't remember the questions, does this
transcript in any way refresh your memory as to the normal prac-
tice of the disposition of the snow taken off the walks around
200| the Washington Monument grounds, and in particular this one on
Plaintiff's Exhibit Number 4?

201 THE COURT: Well, I thought he had answered that
and said he didn't know.

MR. TAUSIG: Well, I am asking whether this refresh-
es his memory.

THE COURT: Alright. Does it?

THE WITNESS: No, it does not.

BY MR. TAUSIG:

Q. Does it refresh your memory as to what was done with
the snow taken off this walk when it snowed in November and
December 1966?

A. No, sir.

Q. When you were in my office on September 7, 1967 and questions were asked of you, was there any reason why you were not then testifying under oath as to your best recollection at that time?

202

THE WITNESS: No, sir, there wasn't any reason.

Q. Officer Stevens, how many times, if any, had you --
~~December~~
prior to September 30, 1966 -- observed icy conditions on this particular sidewalk shown on Plaintiff's Exhibit Number 4 in evidence?

MR. SHINNICK: Objection.

THE COURT: The objection is overruled.

THE WITNESS: I have no idea.

BY MR. TAUSIG:

Q. Now, again directing your attention to the deposition I took on September 7th, 1967, I ask you to turn to page 101.

203

MR. SHINNICK: Your Honor, before he begins, may I have a continuing objection to this line?

THE COURT: Yes.

MR. SHINNICK: Thank you.

BY MR. TAUSIG:

Q. I ask you whether, starting just above the middle of the page, page 101, I did not ask you these questions and you made the following answers:

"Q. During this three year period you have observed that as soon as you got the snow piled and it warms up, the temperature warms up, then you begin to have this icy conditions on the sidewalk, is that correct?

A. Yes, sir, and when the snow starts

melting.

Q. It runs down the slope, across the sidewalk and you have the icy condition?

A. Yes, sir.

Q. Which we have talked about, which you have talked about?

A. Yes, sir.

204

Q. Now, did I so ask you those questions on September 7, and you made those answers on September 7th, 1967?

A. I assume so because they are in the deposition.

Q. Now, what has been read to you, does that in any way refresh your recollection as to your observations of icy conditions on this sidewalk prior to December 30, 1966?

A. No, sir, other than it has been several times, it happened periodically, but as to the exact number I have no idea.

THE COURT: Would you read the answer of the witness, please, Miss Quick?

(Whereupon the reporter read the witness's answer as follows:

"A. No, sir, other than it has been several times, it happened periodically, but as to the exact number I have no idea.")

BY MR. TAUSIG:

Q. When you say "periodically," Officer Stevens, how frequently are you intending to -- what frequency are you intending to convey?

A. No particular frequency.

206

MR. TAUSIG: Would the court reporter read the question to the Officer, please?

(Whereupon the reporter read the question as follows: "Q. Officer Stevens, had this icy condition which you referred to as appearing periodically, had it occurred frequently or a sufficient number of times for you to call the condition to the attention of your superiors?")

THE WITNESS: I don't remember.

BY MR. TAUSIG:

Q. Alright. Officer Stevens, let's go to the bottom of page 101 of your deposition, and I ask you, starting at the bottom, I ask you whether on September 7th, 1967, I did not ask you the following questions and you made the following answers:

"Q. And that has been your experience, that that occurs, has occurred repeatedly over the last three years, is that correct?"

A. Yes, sir, that's right."

Top of page 102:

"Q. Did you ever report those facts to your superior?

A. Well, how do you mean -- verbally, written or--

Q. Yes, anyway.

A. Yes, sir, verbally several times

207

and several times it was brought to my attention by other officers."

Now, were those the questions I asked you and were those the answers you gave on September 7th, 1967?

A. I assume so.

Q. And does the reading of those questions and answers in any way refresh your recollection on this matter?

A. No, sir.

Q. You have no recollection, present recollection, at the present time, of calling icy conditions, repeated icy conditions to the attention of your superior officers, now -- that is, I am talking about on the walks of the Washington Monument grounds.

MR. SHANNICK: The witness has already stated, Your Honor, he has exhausted his recollection and reading the deposition has not refreshed it.

THE COURT: I don't believe he exactly said that. I will overrule the objection.

The question is: Does that refresh your recollection, what's just been read to you?

208

THE WITNESS: I have notified my superiors in as far as icy conditions. I don't remember any specific time; but I have done it, or did do it, when I was patrolling this one particular area.

But specifically I couldn't say, I couldn't pinpoint a particular day that I did it or how many times I did it.

BY MR. TAUSIG:

Q. But you did do it prior to December 30, 1966, is that correct, sir?

It would have been a normal practice but I don't remember ever doing it.

Q. - Alright. Now, Officer Stevens, let's direct your attention to the specific period between December the 24th and December 30th, 1966, the last day being the day Mrs. Bernstein said she fell on the walk in Plaintiff's Exhibit Number 4 in evidence.

I would ask you during that period of time did you have occasion to inspect this particular walkway?

A. I don't remember.

Q. Now, I ask you, Officer Stevens, to turn to page 80 of your deposition of September 7th, 1966.

MR. SHINNICK: Same objection, Your Honor.

THE COURT: The objection is overruled.

MR. TAUSIG: Excuse me, I meant to say page 79 instead of 80, Your Honor.

BY MR. TAUSIG:

Q. Officer Stevens, beginning with the second question on that page, I would like to ask you whether I made the following questions and whether you gave the following answers:

"Q. Do you recall whether between December 24th, 1966 and December 30th, 1966, you had in fact inspected the Washington Monument grounds' sidewalks?

A. Specifically I couldn't say.

Q. That was included in your duties, is that correct?

A. Yes, sir."

* * *

210

BY MR. TAUSIG: My question was:

"Q. That was included in your duties, is that correct?

A. Yes, sir, I couldn't say when I inspected it or how I inspected it or what time. However I can say that I did inspect them but I couldn't pinpoint the times."

Now, Officer Stevens, is it a fact that I asked you those questions and you gave those answers on September 7th, 1967?

A. I assume so.

Q. Now, does that refresh your memory as to whether or not you had in fact inspected this particular walkway and other walkways around the Washington Monument grounds, on or between December 24th and December 30th?

A. Does that refresh my memory?

Q. Yes.

A. No, sir. ***

Q. Officer Stevens, directing your attention to December 30th, 1966, would you tell Her Honor whether you had an occasion to inspect the walk shown on Plaintiff's Exhibit Number 4 in evidence?

A. Yes, sir, I did.

Q. Now, do you recall what you found at that time?

MR. SHINNICK: May we ascertain the time that the inspection was made, please, Your Honor?

BY MR. TAUSIG:

Q. Alright. I'll ask you when on December the 30th?

A. Sometime in the afternoon. I don't remember the exact time.

At that time did you see any snow around or on the walk?

* * *

THE WITNESS: As I recall, there was snow piled on each side of the sidewalk.

BY MR. TAUSIG:

213 Q. And what was the condition of the walk itself?

A. The sidewalk was partially clear-- Excuse me. Part of the sidewalk was clear. Other parts were icy or watery.

* * *

Q. What was the condition of the walkway when you examined it on December 30, 1966, that part of it which leads from the Kiosk building, going up the slope to the point on the photographs where you have drawn the two parallel lines?

214 THE WITNESS: * * * As I recall, that particular part of the sidewalk was partially clear of ice and water and partially not.

BY MR. TAUSIG:

Q. How much of that area of the sidewalk, if you recall, was covered with ice?

A. I don't recall.

Q. Now, Officer Stevens, I ask you to turn to page 80 of your deposition taken on September 7th, 1967, and I ask you to read to yourself from page 80 to page 84.

Have you read it, sir?

A. Yes, sir.

Q. Now, I ask you this question, Officer. Looking at page 84--

A. Yes, sir.

Q. Have you read page 84, all of page 84?

A. Yes, sir. * * *

218.

MR. TAUSIG: . . . I will read the question in full. The question, the last question in full on page 84 in my copy of the deposition is:

"Q. You mean run across the sidewalk?"

And this is the complete answer:

219

"A. Yes, sir. Now in this particular area in here it would be completely frozen with ice. No part of the sidewalk would be visible. This would be completely across.

Of course, I'm not an expert on snow and ice, but I would assume that the water would freeze right there and stay there. In other words, it wouldn't go closer to the parking lot from this one particular valley which was approximately, oh, twenty, maybe twenty-five feet in length, and then after this valley, then it would become intermittent with ice and clear sidewalk."

BY MR. TAUSIG: . . .

Q. Now, did I state that question and did you give that answer?

A. I assume so because it's in the deposition.

Q. Now, does that in any way refresh your memory as to the condition of the sidewalk, shown in Plaintiff's Exhibit Number 4 in evidence, on December 30, 1966 when you inspected it?

A. No, sir.

Q. Now, Officer Stevens, if I am wrong you tell me, but

220

my recollection of your testimony was that between December 24th and December 30th you had inspected this particular walk -- is that correct, sir? You just don't remember what times of day it was?

A. That's correct.

Q. Alright. Now, do you remember what the condition of this walk, this particular walk shown in Plaintiff's Exhibit Number 4 in evidence, what the condition of that walk was at the times you inspected it between December 24th and December 30th, 1966?

A. No, sir.

* * *

221

Q. Now, Officer, I ask you to turn to page 91 at the bottom of your deposition of September 7th, 1967, and I ask you whether I did not ask you the following questions and whether you did not give the following answers:

"Q. Do you have any knowledge--"

The last question on page 91:

"Q. Do you have any knowledge of how

long the icy condition on this sidewalk leading from the Washington Monument, which you described, that you inspected on the afternoon of December 30th -- how long that icy condition had been in existence?

A. Ever since it had snowed and the snow had been removed from the sidewalk during the day. The warm part of the day the snow would melt. Then in the evening the cooler air would freeze it, would freeze

the melting snow."

Now, I ask you, Officer, whether I did not ask you this question and you gave that answer on September 6th, 1967?

A. I assure so.

Q. Now, does that in any way refresh your memory as to what the conditions of this particular walkway --- on which Mrs. Bernstein is alleged to have fallen --- what those conditions were when you inspected that walkway between December 24th and December 30th?

A. No, sir, I don't.

Q. Officer Stevens, as I understand your testimony, you said that when you -- you remember inspecting this particular walkway on December 30th but you have no present recollection of 223 its condition at the time you inspected it -- is that correct?

A. No, sir.

Q. Oh?

A. When I inspected it on December the 30th--

Q. Right.

A. The sidewalk was partially clear of ice and partially ice and water.

Q. Alright.

MR. SHJNNICK: Your Honor, could we get straight the time on December 30th that the Officer inspected it?

THE COURT: Alright. Do you know?

THE WITNESS: Your Honor, it was sometime in the afternoon.

THE COURT: Can you fix the time in the afternoon any closer?

THE WITNESS: I inspected the sidewalk immediately after leaving George Washington Hospital and interviewing Mrs. Bernstein. I don't know that particular time but it was immediately after that.

THE COURT: You said that you remember that it was partially clear and partially what?

THE WITNESS: Ice and water.

224 Q. Officer, as I understand your testimony, it is that you have no present recollection of the condition of the sidewalk, shown in Plaintiff's Exhibit Number 4 in evidence, on the times that you inspected it between December 24th and prior to December 30th when you inspected it -- is that correct?

225 A. Yes, sir. * * *

Q. Have you read my question at the bottom of page 91 and your answer at the top of page 92?

A. Yes, sir.

Q. Now, does that reading in any way refresh your memory as to what the condition of this particular walkway, shown on Plaintiff's Exhibit Number 4 in evidence, was when you inspected that walkway between December 24th and before December 30th, 227 1966?

A. No, sir. * * *

Q. Now, Officer, the question, if you will follow me on page 94, did I not ask the question:

"Q. Now, you made a statement a few moments ago that to the best of your knowledge this icy condition that you described on the sidewalk had been there since it snowed, and the snow was piled up on each side of the sidewalk, is that correct?"

And the answer as transcribed here is:

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"A. The icy condition was from the snow melting, the water running on to the sidewalk and then freezing in the evening or at night, any time that the sun went down and the cold temperatures came about.

And this condition had occurred every night or every morning when an investigation of the grounds was conducted, and it was found to be the same where it would be partly clear and partly ice over since it had snowed the first time. I believe you said it was the 24th of December."

Now, Officer, I ask you whether I didn't put that question to you and whether you didn't give that answer on September 7th, 1967?

A. I assume so.

Q. Alright. Now, does that in any way refresh your recollection as to what the condition of the walkway, shown in Plaintiff's Exhibit Number 4 in evidence, was when you inspected it between December 24th and December 30th?

A. No, sir.

DEFENDANT'S CASE

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MR. SHINNICK: May I have this marked as Defendant's Exhibit 1, please?

(Whereupon Defendant's Exhibit number 1 was marked for identification.)

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Whercupon

EDWARD H. ISON

was called as a witness by the defendant and after having been first duly sworn was examined by counsel and testified as follows:

DIRECT EXAMINATION

* * *

Q. Would you tell us your name, please, sir?

A. My name is Edward H. Ison.

Q. Tell us your occupation, please, sir?

* * *

A. I am meteorologist in charge of the airport station at Washington National Airport.

Q. How long have you been so employed, sir?

A. More than twenty-five years.

Q. And were you employed as the chief meteorologist for the District of Columbia during the month of December 1966?

A. No, I did not become meteorologist in charge at the airport until '67.

Q. Were you employed as a meteorologist in the month of December 1966?

A. Yes, sir.

Q. And you became chief in 1967, is that correct?

A. That is correct. * * *

BY MR. SHINNICK:

Q. Mr. Ison, I'll show you what's been marked as Defendant's Exhibit Number 1 for identification and ask you if you can recognize what that is, sir?

A. Yes, sir.

Q. Would you tell us, please?

A. This is a certificate of certification of the weather

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records which are located at the Washington National Airport.

Q. And did you at my request bring those records to the courthouse today?

A. No, sir, I believe Mr. Hobbs brought these to you.

Q. That's correct. You are correct. Did you at his request prepare those records so that he might bring them down?

A. Yes, sir.

Q. And are those the records of the weather conditions in the District of Columbia on the 28th, 29th and 30th of December 1966?

240 A. Well now, these are records made at the Washington National Airport.

Q. Right, are those the dates--

A. That is the location of the observation site.

Q. Am I correct that the dates reflected in Government's Exhibit Number 1 for identification are December 28th, 29th and 30th?

A. Yes, sir.

Q. Now, Mr. Ison, I am going to show you Plaintiff's Exhibit Number 13 which is in evidence and ask you if you can recognize that, sir?

A. Yes, sir.

Q. Can you tell us what that is?

A. That is a local chronological data and this is a summary of a day, each day. It gives you the extremes for the end of the month, the average, and it records the total precip and snowfall and so forth.

MR. SHINNICK: Might I ask at this point if there is

any objection to this witness's being qualified as an expert meteorologist?

MR. TRUSIG: None.

MR. SHINNICK: I will then proceed.

BY MR. SHINNICK:

Q. Mr. Ison, calling your attention to Plaintiff's Exhibit Number 13 which is before you, and Government's Exhibit Number 1 which is before you, could you tell me, please, sir, whether or not I am correct in saying that at 9:36 a.m. on December 28th snow started falling?

A. That is correct.

Q. And that snow continued until it ended at 3:44 p.m. on that date?

A. That is correct.

Q. And at that time, 3:44 p.m., am I correct in saying that the snow changed to freezing precipitation?

A. That is correct.

Q. And that freezing precipitation lasted until 7:51 p.m.

A. That is correct.

Q. This is all in the day, now, of December 28, 1966?

A. That is correct.

Q. Am I also correct in saying that at approximately 7:51 p.m. on the 28th light rain started?

A. That is correct.

Q. And continued until 5:45 a.m. on December 29th?

A. That is correct.

Q. Can you tell us from the records before you approximately how much snow and or sleet fell between the hours 9:36

a.m. on the 28th -- strike that.

Can you tell us from the records before you, Mr. Ison, how much precipitation, either in the form of snow or sleet, freezing precipitation or whatever, fell between the hours of 242 9:36 a.m. on the 28th and 3:44 p.m. on that date?

A. 3:44 p.m., the 28th -- well, sir, from 9:00 a.m. until 4:00 p.m. -- we record this by hours by getting it off the chart

From 9:00 a.m. until 4:00 p.m. you had twenty one-hundredths of precipitation that had fallen.

Is that what you asked?

Q. Yes, sir. Could you, if you would, change that measure from precipitation into inches of snow?

A. The snow that was recorded was one-point-two-tenths of an inch.

Q. Can you tell us--

A. That was the snowfall.

Q. Can you tell us, please, what amount of snow was on the ground before that new snow began to fall on the 28th?

A. Two inches.

Q. Can you tell me how much snow was on the ground at midnight on the 28th? ✓

A. Two inches.

Q. And could you tell me approximately how much snow was on the ground between the hours of 1:00 p.m. and 7:00 p.m. on the 28th?

A. What is the time again, sir?

Q. 1:00 p.m. in the afternoon, Mr. Ison, until 7:00 p.m. in the evening of the 28th.

A. Four inches.

- 242 Q. How much snow was on the ground midnight the 29th?
A. Two inches.

Q. And on midnight the 30th?
A. Two inches.

Q. And do your records reflect, Mr. Ison, whether or not there was any precipitation during the day of the 30th?
A. No precipitation on the 30th.

Q. Now, Mr. Ison, I would like to call your attention to some temperatures, if I might. I would like to start at 6:00 a.m. on the 29th and ask you what the temperature was at that time?
A. Thirty-five.

Q. I would like to call your attention to noon of the 28th and ask you the temperature at that time?
A. I thought you said the 29th the first--
Q. Excuse me, you're absolutely right. This is the 29th.
A. Are we working the 29th?
Q. The 29th, excuse me.
244 THE COURT: Are you asking now for noon of the 29th or the 28th?
MR. SHINNICK: The 29th, Your Honor.
THE WITNESS: The 6:00 a.m. temperature I gave you was for the 29th.
BY MR. SHINNICK:
Q. Fine. That was thirty-five, is that correct?
A. Yes, sir.
Q. Okay, now at noon on the 29th.
A. Thirty-seven.

Q. At 1:00 p.m. on the 29th?

A. Forty-one.

Q. At 11:00 p.m.?

A. Eleven p.m.?

Q. On the 29th.

A. Thirty-one.

Q. At 10:00 a.m. on the 30th?

A. Thirty-three.

Q. Mr. Ison, am I correct in saying that the temperature was below freezing between 11:00 p.m. on the 29th and 10:00 a.m. on the 30th?

A. From 11:00 p.m. until what?

Q. 10:00 a.m.

A. Until 10:00 a.m. --- the temperature was thirty-three degrees at 10:00 a.m., sir. One degree above melting.

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Q. Calling your attention to the period of time between 11:00 p.m. on the 29th and 10:00 a.m. on the morning of the 30th, could you tell us what the temperatures were in that interval of time?

Maybe that's too many temperatures there to read. Can you tell me what the temperature was--

A. I can read them. We start at 11:00 p.m. it was thirty one. Midnight it was thirty-one.

THE COURT: What date is that?

THE WITNESS: That's the 29th.

The 30th at 1:00 a.m. it was thirty-one. At 2:00 a.m. it was twenty-eight. At 3:00 a.m. it was twenty-nine. At 4:00 a.m. it was twenty-eight. At 5:00 a.m. it was twenty-six.

At 6:00 a.m. it was twenty-five. At 7:00 a.m. it was twenty-six. At 8:00 a.m. it was twenty-five. At 9:00 a.m. it was twenty-nine. And at 10:00 a.m. it was thirty-three.

246 MR. TAUSIG: That's on the 30th, is that correct?

THE WITNESS: Yes, right.

BY MR. SHINNICK:

Q. The morning of the 30th?

A. Yes, sir.

Q. Can you tell me, Mr. Ison, then, the temperatures were below freezing between the hours of 11:00 p.m. the night of the 29th and 10:00 a.m. on the morning of the 30th?

A. That is correct.

MR. SHINNICK: Thank you very much. I have no further questions of this witness.

CROSS EXAMINATION

BY MR. TAUSIG:

Q. Mr. Ison, just a couple of questions in the way of classification.

You have Plaintiff's Exhibit Number 13, the U.S. Weather Report, in front of you?

A. Yes, sir.

Q. And do you see on that weather report, or is it not a fact that it shows on that weather report that on the 24th of January there was six and a half inches of snow recorded as falling in the Washington area on that date?

A. 24th of January -- this is December.

Q. 24th of December.

A. December, yes, sir. And what was the question, sir?

247 Q Does that weather report show that six and a half inches of snow fell in the Washington area on December the 24th?

A That is correct.

Q Now, does that weather report show that one-point-eight inches of snow fell in the Washington area on December the 28th?

A That is correct.

Q Does that weather report show that no appreciable or measurable amount of snow, sleet or rain fell in the Washington area on the 29th and 30th?

A The 29th it had point-two-zero liquid precip.

Q I am talking about snow, sir.

A 'M'hm.

Q Was there any measurable amount of snow on the 29th in the Washington area according to that weather report?

A That had fallen?

Q That had fallen on that day.

A The 29th we did not have any snowfall, no, sir.

Q Pardon?

A The 29th there was no snowfall. It was a liquid precipitation.

Q Now, sir, on the 29th you said the weather report shows that there was some amount of precipitation of an --- I think you said point-two-zero percent?

A Hundredths. It would be a fifth of an inch.

248 Q A fifth of an inch?

A This was liquid that had fallen during the day.

Q And what type of liquid would that be as indicated by

the weather report?

A. For the 29th?

Q. Yes, sir.

A. Rain and drizzle.

THE COURT: I didn't get that.

THE WITNESS: Rain and drizzle.

BY MR. TAUSIG:

Q. And during what hours?

A. Well, it continued over from the 28th and it ended at 5:45 a.m.

Q. On the morning of the 29th, is that correct?

A. That is correct.

Q. So as I understand your testimony, then, this one-point-eight inches of snow which fell in the Washington area on the 28th, that was immediately followed by this one-fifth of an inch of rain, is that correct, which stopped at 5:00 a.m. on the 29th?

A. Well, the rain began back on the 28th, at 7:51 p.m. on the 28th.

Q. What time did the snow stop on that day?

A. On the 28th -- the snow stopped at 3:44 p.m. on the 28th.

Q. Then there was an interval of time, as I understand it,
249 7:00 p.m. or thereabouts on the 28th it began to rain or drizzle,
is that correct?

A. That is correct.

Q. And did that continue until 5:00 a.m. in the morning of
the 29th?

A. Until 5:45 a.m.

Q. 5:45 a.m.?

A. On the 29th, yes, sir.

Q. And the total amount of rain during that period of time was one-fifth of an inch, is that correct?

A. No, sir, it would be more. The one-fifth precip I gave you was for the 29th of December but if you are reaching back into the 28th you would have to total it up.

Q. In other words, what you are saying is from twelve midnight until 5:45 a.m. there was one-fifth of an inch, right?

A. That's right.

Q. Now, let's go back into the 28th. On the 28th, as I understand, it began to rain around 7:00 p.m. you said, is that correct?

A. That's 7:51 p.m., correct.

Q. Alright. And up until midnight how much rain was there, sir?

A. Thirty-six-hundredths.

Q. Thirty-six-hundredths of an inch?

A. That is correct.

250 Q. Now, sir, I understood your testimony to be that between 1:00 p.m. and 7:00 p.m. on the 28th of December 1966 there were two inches of snow on the ground, is that correct?

A. 1:00 p.m. to what?

Q. Seven p.m.

MR. SHINNICK: My notes reflect four inches.

THE WITNESS: Four inches is correct.

BY MR. TAUSIG:

Q. Four inches?

A. Yes, sir.

Q. And at midnight on the 29th there was how much?

A. - Midnight on the 29th going to the 30th?

Q. No. From the 28th to the 29th.

A. Two inches.

* * *

Q. * * *

As I understood your testimony, you said between 1:00 p.m. and 7:00 p.m. on the 28th there was four inches on the ground, is that right? -- four inches of snow.

A. That is correct.

Q. Now let's go five hours later to midnight, one minute before midnight on the 28th, how much snow was on the ground then?

A. They measure the snow at midnight. He has here it is two inches.

251.

Q. Now then, twenty-four hours later -- strike that.

So in other words, the inches of snow on the ground between 7:00 p.m. on the 28th and midnight on the 28th had been reduced two inches, is that correct?

A. That is correct.

Q. And that would be by melting, would it not?

A. Right, correct -- it would have to melt.

Q. Now, then between the 28th midnight and the 29th midnight there was no melting, is that correct, because there was still two inches on the ground?

A. Correct.

Q. And between the 29th midnight and 30th midnight there was no melting of the snow because there was still two inches on

the ground?

A. That is correct.

MR. TAUSIG: I have no further questions.

REDIRECT EXAMINATION

BY MR. SHINNICK:

* * *

On the day of the 29th, during the day, say from 6:00 a.m. until 11:00 p.m., whether or not the temperatures were in fact above freezing. Could you check that on your records for us, sir?

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A. From 6:00 a.m.?

Q. Approximately, yes, sir.

A. On the 29th?

Q. On the 29th, now. From 6:00 a.m. on the morning of the 29th to approximately 10:00 p.m. during the evening of the 29th.

A. That--

THE COURT: Just one moment. When you first put that question you said 11:00 p.m.

MR. SHINNICK: That doesn't make--

THE COURT: Now you're changing it to ten?

MR. SHINNICK: I'll make it ten. It doesn't make any difference.

THE WITNESS: From 6:00 a.m. until 10:00 pm?

BY MR. SHINNICK:

Q. Yes.

A. The temperature went to forty-one degrees.

Q. Were the temperatures during that interval of time above freezing; namely, were they above thirty-two degrees?

A. Yes, sir.

Q. During that entire length of time. Now is my understanding also correct that between approximately 11:00 p.m. on the night of the 29th and 10:00 a.m. on the morning of the 30th, the temperatures were below freezing.

A. It was below freezing.

Q. I couldn't hear you.

253

A. It was below freezing.

Q. Below freezing?

A. From the 29th at 11:00 p.m. up until what?

Q. About 10:00 a.m. on the morning of the 30th.

A. They were below freezing.

Q. During that entire time the temperatures were below freezing?

A. Yes, sir and at ten a.m. the temperature was thirty-three degrees.

Q. The temperature started rising and went above freezing at around ten a.m.?

A. Yes, sir.

Q. Let's get this straight, Mr. Ison, and I won't keep you any longer.

Between 6:00 a.m. on the 29th and 10:00 p.m. on the 29th, the temperatures were above freezing?

A. That is correct.

Q. And then through the night of the 29th and during the early morning hours of the 30th, the temperatures went below freezing and remained below freezing until approximately ten a.m.?

254

A. That is correct.

260

Whereupon

JAMES LEISTNER

was called as a witness by
the defendant and after having been first duly sworn was examined by counsel and testified as follows:

DIRECT EXAMINATION

BY MR. SHINNICK:

* * *

- Q. And would you tell us your occupation, please?
- A. Landscape gardener foreman for the National Park Service
- Q. How long have you been so employed?
- A. Seven years.
- Q. I would call your attention to the dates of December 28th to 30th, 1966. Were you so employed at that time?
- A. Yes, sir.
- Q. Mr. Leistner, would you tell us whether or not you had occasion to go to the Washington Monument grounds in the course of your duties with the National Park Service on the date of December 28th, 1966?
- A. Yes, sir.
- Q. What, if anything, did you do there.
- A. We spread a mixture of sand and calcium on icy spots along the sidewalks.

THE COURT: What was it you said you spread?

THE WITNESS: Sand and calcium -- a mixture.

BY MR. SHINNICK:

- Q. Mr. Leistner, I'm going to show you what has been marked as Plaintiff's Exhibit Number 4 in evidence, which purports to be a picture of a sidewalk at the George Washington Monument.

I ask you to look at that picture just for a moment, sir, and see if you recognize it?

A. Yes, sir.

Q. Is that one of the sidewalks on which you put sand and calcium on December 28th, 1966?

A. Yes, sir.

262 Q. Can you recall now, Mr. Leistner, how many people were in your crew at that time?

A. There were three on that job, two men and myself.

Q. Do you recall whether or not the snow had been removed from the sidewalk before you put down sand and calcium?

A. Yes, sir.

Q. Can you recall approximately what time of the day this was?

A. It was late in the afternoon. I don't know exactly what time it was but we completed the work at 5:00 p.m.

Q. Did your crew also remove the snow or was your crew merely charged with the duty of putting down the sand and calcium?

A. Just the sand and calcium.

Q. Did you see a snow removal crew out there that day?

A. No, sir.

Q. Did you see snow on the sidewalks where you were putting down the sand and calcium?

A. Very small, little spots where little spots were blocked off --- low spots on the blacktop.

Q. Was there snow on the ground on the 28th?

A. Yes, sir.

Q. And is it your testimony that although there was snow on the ground, the snow had been removed from the sidewalks?

A. Yes, sir.

263 Q. Do you recall my asking you, Mr. Leistner, if you would check the records at the National Parks Service to determine in fact which day it was that you were out there putting down the sand and calcium?

A. Yes, sir.

Q. Did you check those records, sir?

A. Yes, sir.

Q. And what date did it show, sir?

A. The 28th and also the 30th.

Q. Would you tell the court in relation to the 28th how you can be certain in your memory that you were in fact out there on that day?

A. All of our overtime work has to be justifiable and we have to prove why we worked overtime.

Q. Did you work overtime on the 28th?

A. Yes, sir, one hour.

Q. Was the George Washington Monument your usual place to work, was that your usual territory?

A. No, sir.

Q. Is my understanding correct that you fix the time and place by virtue of the fact that it was not your usual territory and by virtue of the fact that you worked overtime?

A. Yes, sir.

Q. Now, Mr. Leistner, would you tell the court, please, why there is anything peculiar to you why you don't work over-

204 time?

A. I just prefer not to. I figure I should make it in forty hours a week. At my age I would rather not work the overtime.

Q. Now, I believe you told us, sir, that you also had occasion to be on the Washington Monument grounds on December 30, 1966?

A. Yes, sir.

Q. Can you recall approximately what time of day that was?

A. Approximately about eleven o'clock in the morning.

Eleven o'clock I got orders to send two men to the Monument grounds and about 11:55 before I was able to get them on the Monument grounds.

MR. TAUSIG: I didn't hear that answer.

MR. SHINNICK: I'll see if I can straighten it out.

BY MR. SHINNICK:

Q. You say you received a call at approximately eleven a.m.?

A. Yes, sir.

Q. To get the men out to the Washington Monument grounds?

A. Yes, sir.

Q. Do you recall where that call came from, who originated the call?

A. My supervisor.

Q. Whose name was?

A. Mr. Stephen Lynch.

265 Q. And I believe you testified --- my understanding was --- that your men got out there around 11:55?

A. Yes, sir.

Q. Somewhere around noontime?

A. Yes, sir.

Q. Were you with them, sir, or did you merely tell them to go there?

A. I sent them to go to the job.

Q. And what instructions did you give them, sir, when you sent them?

A. We received a call of ice at the concessionaire stand at the Monument grounds. I told them to go chip the ice and put sand and calcium and to check the other walks on the Monument grounds and if there's any ice to do the same there.

THE COURT: I didn't quite understand what you said this area was.

THE WITNESS: At the concessionaire stand.

THE COURT: Concessionaire stand?

THE WITNESS: Yes, ma'am.

THE COURT: Where is that?

THE WITNESS: At Fifteenth Street, the souvenir stand.

THE COURT: And where else did you tell them to go?

THE WITNESS: To check all other spots, all other

266 walks, if there is any other icy spots to--

BY MR. SHINNICK:

Q. Do you have a recollection now, at this time, of approximately when they finished their job?

A. They returned to the office about twelve-twenty; twelve-fifteen or twelve-twenty.

Q. Is there any reason why you remember this particular time?

A. Yes, because the two men that I sent -- they are habitual grippers and I sent them during their lunch period and they didn't like that one bit.

MR. SHINNICK: I have no further questions of this witness. Your witness, Mr. Tausig.

CROSS EXAMINATION

BY MR. TAUSIG:

Q. Mr. Leistner, as I understand your testimony, the only reason that you remember that you were at the walk shown in Plaintiff's Exhibit Number 4 in evidence on the 28th day of December 1966 -- on the 30th day of December -- excuse me -- the 28th day of December 1966, was because you looked at some records which show you have overtime?

A. Yes, sir.

Q. That's the only thing. You don't have any records that show you were there, do you?

A. No, sir.

267 Q Now, Mr. Leisiner, as I understand it, you said -- if I am wrong you correct me -- you were the landscape architect gardener for the National Parks Service?

A Landscape gardener foreman.

Q Landscape gardener foreman -- and in that capacity are you familiar with the terrain shown in Plaintiff's Exhibit Number Four?

A Yes, sir.

Q And isn't it a fact, sir, that as you are coming down from the Monument, walking down from the Monument as the people shown on this photograph are, that on their left-hand side, the terrain on the left-hand side of the walk is slightly higher in elevation than the right-hand side of the walk?

A Yes, sir.

Q Now, sir, you say you have been in the capacity of landscape gardener foreman for seven years, is that correct?

A No, sir.

Q No?

A I have been with the Parks for seven years.

Q Alright. Well, how long have you been, has it been your duty to look after hazards, correct hazardous conditions at the Washington Monument grounds?

A Just on temporary assignments.

Q Well, has that been on temporary assignments for seven years?

268 A. For five years.

Q. For five years -- so that would take it back to 1964, is that correct?

A. Yes, sir.

Q. Now, have you during that five year period had occasion to observe hazardous conditions on this walk on prior occasions, prior to December 28th, 1966?

A. Yes, sir.

Q. And isn't it a fact, sir, that every time that we have snow in the District of Columbia the crews employed by the National Parks Service have cleaned this particular walk and piled the snow on both sides of the walk?

A. Yes, sir.

Q. And isn't it a fact that every time we have a fall, then after that it freezes at night, then this walk becomes icy?

A. In certain locations.

Q. Now, which locations are those, sir?

A. Approximately right here at the foot of this slope here.

Q. In other words, you are pointing where this 'X' is?

A. Where the ink mark stops. There is still a slope there and more or less of a level spot right in through here.

Q. So that the court may understand where you are talking about -- there are several ink marks on here, Your Honor, and Mr. Leistner has pointed to this area where this line stops.

269 This is the line, I believe -- these are the two lines drawn by Officer Stevens indicating where he had been informed that Mrs. Bernstein fell.

THE COURT: You said where the ink line stops. You mean this ink line right here, do you?

THE WITNESS: Yes, ma'am.

BY MR. TAUSIG:

Q. So now, as I understand it, Mr. Leistner, so there will be no mistake about it, you had knowledge of the fact for five years from today, or two years prior to December 28, 1966, that this particular spot would become icy if the crews of the National Parks Service cleaned the walk of snow and put snow on both sides of the walk?

A. Not always, depending on the temperature of the--

Q. Well, let me put it this way. I had further qualifications. If there was melting and then freezing at night?

A. Yes, sir.

Q. Had that been brought to your attention by chance by Officer Stevens of the Park Police or other officers?

A. No, sir.

Q. How did it come to your attention, sir?

A. My supervisor, Mr. Lynch.

Q. And was there any discussion between you two as to how that could be corrected?

A. Quite often, sir.

270 Q. And did it ever occur to you in your discussions that you shouldn't pile snow on the right-hand side of the walk as you come down because that was higher elevation?

A. No, sir.

Q. Now, Mr. Leistner, I believe you stated in your testimony that sand and calcium had been placed on this walkway on the 28th day of December, is that correct?

A. Yes, sir.

Q. And then I believe you also testified that to your knowledge, or not to your knowledge but that you had given instructions to have sand and calcium placed at the concessionaire stand on the 30th?

A. Concessionaire stand and other hazardous places.

Q. To your knowledge, personal knowledge, you don't know whether sand and salt was placed on this particular walk shown on Plaintiff's Exhibit Number 4 in evidence prior to 11:50 a.m. on that morning, do you -- the 30th?

A. Only on the 28th, the night of the 28th, or the evening of the 28th.

Q. Now, as I understand it, on the 30th, sir, you say you got a call about eleven a.m. advising you that there was a dangerous condition at the concessionaire stand, is that correct?

A. Yes, sir.

THE COURT: Is the concessionaire stand that little building that's shown in the picture?

271

THE WITNESS: No, ma'am. That's what they call an information booth that's only open during the tourist season.

BY MR. TAUSIG:

Q. The concessionaire stand is actually several blocks away from the area shown in this photograph, is it not, sir?

A. I would judge about two city blocks.

Q. It's on the other side of the Monument?

A. Yes, sir.

* * *

272 Q Now, the call that you got simply reported a dangerous condition in the concessionaire area, did it not?

A. - Yes, sir.

Q And that's what you told your men to go and remedy, is that right?

A. To remedy that and to check for further hazardous spots and remedy those also.

Q Whether they remedied the concessionaire spot or any other spot, you do not know, do you, of your own personal knowledge?

A. I did not check it, no, sir.

276 Q Mr. Lynch (sic), *** once you put salt, or salt and calcium mixture on a walk, such as the one shown in Plaintiff's Exhibit Number 4 in evidence, how long does it remain there?

A. The name is Leistner.

277 Q Leistner, I'm sorry, sir, excuse me.

A. The sand and calcium -- the sand especially will stay until it's cleaned up, either a heavy downpour of rain or a sweeping job by our men. Now the calcium, depending on the amount of moisture that falls.

Q So in other words, sir, you were there at five-- You finished your job, you say, of salting and calcium this walk at five p.m. on the 28th of December, is that correct?

A. Yes, sir.

Q Well, how long did it take you to salt and calcium this walk?

A. Possibly three or four minutes off the back of a pick-up truck.

Q. Three or four men, did you say?

A. Minutes.

Q. Three or four minutes. Now, Mr. Leistner, if there had
278 been a light rain which started at about five p.m. on the 28th
day of December and continued until the morning of December 29th,
would that wash away your salt and calcium?

A. We don't put salt on. It was sand.

Q. Excuse me -- sand and calcium.

A. The sand -- it would wash some of it, not all of it.
The calcium would be -- a good percentage of it would, with the
overnight rain, wash away the calcium.

Q. And substantial part of the sand also, is that correct?

A. No, the biggest majority of the sand would remain unless it was a downpour.

Q. If the temperatures remained below freezing, the walk would remain icy, isn't that so -- the ice would remain on the walk? The sand and calcium would not take it off the walk?

A. The calcium would dissolve the ice.

Q. When it was below freezing?

A. Yes, sir.

Q. So your expectation would be, then, that as of the 28th day of December, once you had salted and calciumed there would be no ice on that sidewalk?

A. For a certain period.

Q. Well, what is that period, sir -- can you tell us?

A. Until the calcium is completely used up and exhausted.

Q. How long would that take, sir?

A. Depending on the weather.

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Q. Well, can you tell us what you mean?

A. With rain maybe twelve hours, and with clearance thirty-six to seventy-two hours.

Q. So if we had this light rain that I talked about from five o'clock in the evening until the morning of the 29th, how long would the calcium keep the walk ice-free.

A. Approximately twelve hours.

Q. And suppose the snow on the right-hand side of this walk melted during that period of time, and then at night it froze, would there be new ice on the walk?

A. Yes, sir.

Q. That is, new ice would come on there even though the calcium had been on there, is that correct?

A. Yes, sir.

* * *

REDIRECT EXAMINATION

BY MR. SHINNICK:

Q. Mr. Leistner, I would like to show you Plaintiff's Exhibit Number 4, the photograph which is in evidence, that Mr. Tausig had occasion to show you, and ask you, if you would, sir, notice where that 'X' is approximately two-thirds of the way down the slope, just about at the base of the feet of the man who appears in the picture, just about where my finger is pointing.

And calling your particular attention to where that is, would you tell me whether or not that area there where the 'X' is, is sloped?

A. Yes, sir.

Q. And am I correct in saying that your testimony was that the ice forms at the base of the slope which is somewhat further down than where the 'X' is?

A. Yes, sir.

Q. And would you state for us, please, approximately how many feet further down the slope that area where the ice accumulates is?

A. About fifteen to twenty feet.

Q. Okay, sir, thank you. Now, Mr. Leistner, am I correct in saying that the purpose of putting down sand is to make the area abrasive so one can get better footing?

A. Yes, sir.

Q. And am I correct in saying that the purpose of putting down calcium is because the calcium reacts with the water and lowers the freezing point?

A. Yes, sir.

Q. Of water?

A. Yes, sir.

Q. Is my understanding correct, further that instead of
28) freezing point being thirty-two degrees, it might be as low as thirty-one or thirty degrees?

A. Yes, sir.

Q. So the purpose of the calcium, then, is to lower the freezing point of water?

A. Yes, sir.

Q. So it won't ice up as quickly?

A. Yes, sir.

Q. We have had some testimony, Mr. Leistner, from a meteorologist who describes the day in question in so far as the precipitation is concerned as freezing precipitation with rain and drizzle beginning I believe it was around seven p.m. that evening -- my memory may be wrong.

As I understood your testimony, a downpour of rain would make the calcium ineffective?

A. Yes, sir.

Q. A drizzle or freezing precipitation would not make the calcium ineffective?

F A. Not for a short period of time, sir.

Q. Is that period of time we are talking about somewhere between twelve to twenty-four hours?

A. Yes, sir.

Q. And the sand is, if I understand you correctly, you have two choices or actually one choice with the question of the sand. You have to go out there and physically remove it, you have to take brooms and brushes and sweep it away?

A. Yes, sir.

Q. The other possibility is a downpour, a cloudburst, might wash it all away?

A. Yes, sir.

RECORD EXAMINATION

BY MR. TAUSIG:

Q. Mr. Leistner, I just want to get one thing clear. The last question Mr. Shinnick asked you was how this particular walkway shown in Plaintiff's Exhibit Number 4 was sanded.

283 As I understand your testimony, you get a crew of men with a truck and they start at the top of the hill and come down sanding it, is that correct?

A. Yes, sir.

Q. So in other words, the only basis, reason for sanding it would be because there was ice on that walk, is that correct?

A. Yes, sir.

Q. So then, I take it that you did not mean to convey the impression that the only place that ice formed on this walk is where you said this line is, this blue line?

A. After the walks are cleaned it's the only place that the ice forms.

Q. Yes?

A. On the 28th we just got through using a tractor with a blade on it to plow the walks. And after they are plowed, all the walks are sanded with sand and calcium.

Q. So, if Mrs. Bernstein -- that's the plaintiff in this case -- fell on ice on this walk on the 30th of December, your testimony is then that she must have fallen on the spot where you say is the only place ice falls (sic), is that correct?

A. Not necessarily.

Q. No? Well, where else would there be ice?

A. Depending on the temperature. If it's real cold, any wet spots will freeze.

Q. So in other words, even though you put salt and calcium 284 on that walk on the 28th, if we had a temperature which permitted the snow to ^{melt} fall and the water to run down from the right-hand side of the walk across toward the left-hand side on the lower ground beneath that, and then it froze at night, you would have icy spots on the other part of the walk?

A. Not in that particular spot there, sir. It's enough of a slope that would drain fairly dry.

Q. Well, sir--

THE COURT: Just a moment. Would you read the witness's answer, please, Miss Quick.

(Whereupon the reporter read the answer as follows: "Q. Not in that particular spot there, sir.

A. It's enough of a slope that would drain fairly dry.")

BY MR. TAUSIG:

Q. Well, let me see whether I understand you, Mr. Leistner. You say if it gets cold enough, even after you have cleared the walk and salted and sanded, your experience has been that there would be ice on other parts of this walk other than at the point where you have previously pointed out that you salted and sanded on the 28th?

A. Yes, sir.

Q. Alright. Now, where would those other spots be?

A. At the very edges where the snow lies.

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Q. At the very edges where the snow lies?

A. Yes, sir.

Q. Alright. Now, the very edges you are talking about are the edges of the walk, are you not?

A. Yes, sir.

Q. And the snow you saw on the 28th was piled up on both sides of this walk from this Kiosk Building shown in Plaintiff's Exhibit Number 4 all the way up to the Monument, was it not?

A. Yes, sir.

Q. So it's possible, and probable, that if it was cold enough that whole walk could become icy again?

A. No, sir.

Q. No? Well, tell me again. I don't understand, sir.

A. Only at the edges, sir.

Q. Well, we have established, have we not, sir, from your testimony, that the left-hand side of the walk as you come down from the Monument is higher ground than the right-hand side of the walk?

A. Yes, sir.

Q. Alright. Now, if the snow begins to melt, the water necessarily flows across the walk, does it not?

A. No, sir.

Q. It does not?

A. No, sir.

Q. Where does it flow?

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A. Generally along the edge of the ice where the snow is.

Q. Well, that's beside the walk, is it not, sir?

A. Yes, sir.

Q. Now, are you saying that water doesn't flow downhill?

A. In most spots on that walk there it's sort of a concave on the walk -- higher in the middle and slopes to both sides.

Q. What you are saying is that both sides of the walk become icy?

A. Yes, sir.

Q. All the way down even after you have cleared?

A. Yes, sir.

Q. To the point of concave?

A. No, sir.

* * *

FURTHER REDIRECT EXAMINATION

287

BY MR. SHJNNICK:

* * *

It is my understanding that the snow plow -- when you go out there with the plow to clear these walks, this one particular walk, you go up one side, push the snow off that side, and come back the other side and push the snow off on the other side?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Okay. Is my understanding correct, that this walk -- the walkway in question -- is, say, higher in the middle and goes off to the sides and down on the sides?

A. Yes, sir, not a great deal higher but it still has a higher point in the middle and slopes to both sides of the walk.

Q. It's just enough to cause the water to run off to the sides, is that correct?

A. Yes, sir.

Q. Alright. And is my understanding correct that when the snow or ice is melting that the water will run down on either side of the walkway?

— A. Yes, sir.

Q. Sort of forming little gulleys?

A. Yes, sir.

Q. And there in those gulleys along the side of the walkway, if the temperature should get below freezing the water would freeze and become icy?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

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Q. Okay.

MR. SHINNICK: I have no further questions. That takes care of it. Thank you.

FURTHER RECOROSS EXAMINATION

BY MR. TAUSIG:

Q. Just one thing, Mr. Leistner. When Mr. Shinnick speaks of gulleys, are you talking about the concrete part of the pavement?

A. No, sir -- along the walk.

Q. Are you now testifying that when the snow melts the water from that snow does not run across the concrete part of the walks?

A. It runs along the edge of it and along on top of it also.

MR. TAUSIG: Okay. That's all I want to know.

FURTHER REDIRECT EXAMINATION

BY MR. SHINNICK:

Q. Mr. Leistner, I won't keep you but for just one question.

When you say the water melts and runs along the sides
289 in the gulleys and also over the top of it, what you are in fact saying -- say this is the walkway in question (indicating at blackboard) there would be gulleys here on each side.

In the area of concrete immediately adjacent to the gulleys, would it contain some water also?

A. Yes, sir.

Q. Is that what you are saying?

A. That's what I am saying, yes, sir.

Q. When you are saying on top of it, you are actually saying on the very edge?

A. Right -- on the very edge, yes, sir.

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MR. TAUSIG: Your Honor has advised us at the bench that in view of Mr. Shinnick's request for a continuance, that you will continue this case until the 31st at which time I may put on any rebuttal that I may have.

I would like to say in that connection, in view of this development, I would like to give notice to Mr. Shinnick at this time that I am applying to the court now, under Rule 26 of the Federal Rules of Civil Procedure, 26D, to use in rebuttal as substantive evidence the deposition testimony of Officer Good and Officer Stevens.

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THE COURT: You are seeking to do that under Rule 26--

MR. TAUSIG: 26(d), paragraph 3(5).

THE COURT: *** What does 5 say? If you will tell me what it says. My rule book is the 1968 edition.

MR. TAUSIG: It says this, Your Honor. You actually have to read a little bit more than just that 5, but it says:

"The deposition of a witness--"

And this is distinguishing it from a party.

THE COURT: yes.

MR. TAUSIG:

"Whether or not a party may be used by any party for any purpose if the court finds, (1) that the witness is dead . . ."

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And so on and so forth, you know -- the witness is more than a hundred miles away. These are the other sub divisions

" . . . or (5) upon application and notice that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

Now this sub division is under (a) which starts out: "At the trial."

So in other words, it is very clear that if the court finds, upon my application and notice to Mr. Shinnick which I am now giving him, that such exceptional circumstances exist as would make it desirable in the interest of justice to permit these depositions to be offered as substantive evidence, the court may do so.

And the phrase, the other part of the phrase, "and with due regard to the importance of presenting the testimony of witnesses orally in open court," I have attempted to present their testimony in open court as they gave it to me on September 7, 1967 when obviously their recollections of this matter were much fresher than they are now.

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At Your Honor's suggestion I gave the deposition testimony to Officer Good to read over and he still comes into court and says he doesn't remember anything about the icy conditions, even though he admits that it was his duty and that he did in fact inspect these walks from the 24th to the 30th.

And now that the government comes in and attempts to persuade the court that those, that this particular walk was not icy except in one spot along the edges, I feel that in the interests of justice this testimony ought to come in as substantive evidence as to what actual eye witnesses -- now Mr. Leistner was not an eye witness except on the 28th of December -- but what actual eye witnesses observed on this walk, eye witnesses in the employ of the United States Government observed this walk from the 24th to the 30th of December.

And also, Your Honor, I might say, the testimony with respect to the fact, what were the icy conditions of this walk after each snow had been cleared off for the three years that this officer, Officer Good, had had that as his regular beat.

And I don't want now to tell Your Honor -- I don't think it would be proper for me to tell Your Honor what he testified to on the 7th of September 1967 but I do think it's fair to say to Your Honor that that testimony of both Officer Stevens and Officer Good as to the condition of this walk, not only on the times that they inspected it during this critical period, but also every time it was inspected after it was cleared of snow, what the conditions were of that walk is entirely contradictory to what this gentleman says -- Mr. Leistner.

MR. SHINNICK: Your Honor, it was interesting for me to sit here and hear Mr. Tausig's diatribe about the testimony of Mr. Leistner in regard to the fact that ice didn't form except at one particular spot and hear him describe to me, representing the government, the fact that we brought this out.

I never asked him the question. I never even knew it until Mr. Tausig asked him the questions on cross examination. That was the first time I even knew of it.

THE COURT: You never knew what?

MR. SHINNICK: That there was only one place on this sidewalk where ice formed. I never asked the witness, Mr. Leistner, that question. Mr. TAusig did on his cross examination.

Quite candidly, Your Honor, I haven't looked at Rule 25 in some time, and I don't--

THE COURT: Would you like to have this?

MR. SHINNICK: I was wondering, if Your Honor is concerned about it we might prepare a memorandum to present them to Your Honor.

THE COURT: Well, you can if you wish.

MR. SHINNICK: I would only suggest that, Your Honor. If Your Honor doesn't feel that's necessary--

My understanding of the rule as Mr. Tausig read it is that in exceptional circumstances. Now--

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THE COURT: The part that he is relying upon is this (d) and it refers to the use of depositions at the trial:

"Or upon the hearing of a motion, or at interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereto in accordance with any one of the following provisions:

3. The deposition of the witness, whether or not a party, may be used by any party for any purpose if the court finds:

- (i) that the witness is dead; or
- (ii) that the witness is at a greater distance than a hundred miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
- (iii) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; or
- (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
- (v) Upon application and notice that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

I might say that the part that I just read is 3.

MR. TAUSIG: Yes, ma'am.

THE COURT: When you spoke of 5, were you speaking of 5 as a part of 3?

MR. TAUSIG: Yes, ma'am.

THE COURT: Well, that is in there. I thought you were speaking of it in the sense of being a sub division which follows four over there.

MR. TAUSIG: Sorry.

THE COURT: It is my understanding of what you said.

MR. SHINNICK: Your Honor, I say that the present circumstances do not fall within the provisions of Rule 26 in regard to allowing the depositions to be used as substantive evidence for the reason that the officers have at all times been available to plaintiff. In fact he has them--

THE COURT: Well, they have been available but
303 they have a striking lack of recollection.

MR. SHINNICK: If I might add this, Your Honor, just as a footnote to what has already gone before.

Mr. TAusig , who had these witnesses under subpoena and put them both on this stand to testify before Your Honor, put them on this stand without having talked to them. I find that rather incredible to not have talked to witnesses before one uses them in his case in chief.

THE COURT: Well, I wouldn't think that would be so incredible, if you have a deposition and people are presumed to speak the truth in the deposition that they give.

MR. SHINNICK: For the first time, Your Honor, I have heard the word "truth" mentioned this morning.

I don't think that Mr. Tausig has at any time even intimated that the officers in fact did not speak the truth.

THE COURT: Well, I don't think he has.

MR. SHINNICK: I don't think there's any question about it. It was their recollection--

THE COURT: Whatever the truth is, they don't recall now what it is.

MR. SHINNICK: As I understood the officers' testimony, Officer Good in fact testified to the best of his recollection. He was asked a few additional questions and he could not remember.

It is not surprising to me, Your Honor, and I don't
304 think it would be surprising to anyone that an officer could not remember whether or not it was raining on December 28th, 1966. I don't believe Officer Stevens could remember whether or not it was raining, whether or not the snow plow had cleared the walk that day.

THE COURT: That's just a few of the things they didn't recall.

MR. SHINNICK: Yes, Your Honor, and the other things they didn't recall, to the best of my recollection now, were things of a similar nature.

Now if Mr. Tausig would wish to call the officers back, give them their depositions to re-read during the period between now and next Monday, it would certainly be understandable, but for us to have to spend two or three days going through that deposition question by question to determine whether or not the questions asked are within the rules of evidence, or whether they can be objected to on the basis of hearsay or conclusion or whatever, I think would prolong this trial unnecessarily. It would take many days.

That deposition is a rather thick one as I recall it--

THE COURT: Well--

MR. SHINNICK: And that's what would have to be done.

THE COURT: Well, this motion has been made for
the first time today.

MR. SHINNICK: That's correct.

305 THE COURT: So I do think that you should have an opportunity to look into the matter and to read the rule and to respond, and so if you want to file this memorandum that you suggested, why I'll give you an opportunity to do it. How many days would you want?

MR. SHINNICK: Do I understand Your Honor wants a memorandum only from me or would you like also--

THE COURT: No, I was going to say that if you file a memorandum, then the other side will have an opportunity to respond to it.

MR. SHINNICK: Well, I was thinking that since it's the motion of the plaintiff that his memorandum ought to come in first and we would have an opportunity to respond to his motion, the moving party.

THE COURT: Well, the only thing is, he has made his motion, presented it here orally, and you have responded and said you would like to file a memorandum.

MR. SHINNICK: If Your Honor wishes us to file a memorandum I will be happy to do it to oblige the court. I merely suggested it.

THE COURT: Well, I just thought it would be fairer since you have suggested it to give you an opportunity to do it.

MR. SHINNICK: If Your Honor wishes one, I will be happy to prepare a memorandum.

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THE COURT: Do you want an opportunity to respond if you desire to?

MR. TAUSIG: Yes, I would like to have the opportunity, Your Honor. I don't want to file a memorandum. I think the rule is clear. It's a matter of discretion for the court. I do think these exceptional circumstances do exist.

As Mr. Shinnick said, I have not suggested that these officers were not telling the truth but the court is capable of drawing their own conclusions about it.

THE COURT: Well now, I wasn't suggesting--

MR. TAUSIG: No, I know you weren't suggesting--

THE COURT: --That the officer was not telling the truth. All I was saying was that in a great many instances he has not remembered what the truth is.

MR. SHINNICK: He has not remembered anything--

THE COURT: Yes.

MR. SHINNICK: --In regard to these particular circumstances. Now, that--

THE COURT: I would not say he has not remembered anything but--

MR. SHINNICK: Well, he has not remembered the particular questions that were asked him about weather conditions, ice and so on.

The fact of the matter is, though, as I understand Rule 26, which has been read by Your Honor to me just a moment

307 ago, it talks of exceptional circumstances and I don't believe that it can be said to be an exceptional circumstance when an officer can't remember whether or not it was snowing or raining or icing on December 28th, 1966.

THE COURT: Well, I don't think it's as simple as that. I think that you have simplified it.

There are numerous instances where he has just said, "I don't recall," the officer has said : "I don't recall," and they are quite numerous.

MR. SHINNICK: Yes, Your Honor.

THE COURT: That might be exceptional circumstances.

MR. SHINNICK: Well, when--

THE COURT: It may well be that there will be some decisions on these rules that will be helpful and nobody has gone into it in this case in the light of the circumstances here.

And that's the reason why I am glad to accept your suggestion that you prepare the memorandum.

* * *

309 MR. TAUSIG:

The point I wish to make, Your Honor, which I have made but Mr. Shinnick doesn't speak of, I think the unusual circumstances, the main thrust of my argument is that the unusual circumstances are that the only way the plaintiffs have of proving their case and of establishing the government's negligence is through the government's employees in this case.

I have taken their deposition and in my opinion have established the government's negligence.

And then they get on the stand with the facts pertaining to the condition of this walk and how long it remained that

way every time it snowed and also between the 24th and 30th of December.

And then they get on the stand and say they don't remember.

I think the unusual circumstances exist, particularly where Mr. Shinnick puts on someone else and says that they did not exist.

MR. SHINNICK: We have been over this ground once before. The witness said it as a result of the cross examination of Mr. Tausig. It came in as news to me also.

* * *

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Whereupon

STEVEN LYNCH

was called as a witness by the defendant and after having been first duly sworn was examined by counsel and testified as follows:

* * *

Q. Can you tell us your occupation, Mr. Lynch?

A. Presently?

Q. Yes, presently.

A. Personnel specialist.

Q. In what department?

A. National Parks Service, Department of the Interior.

315 Q. How long have you been employed by the National Parks Service?

A. A little over two and a half years.

Q. Calling your attention to December 30th, or the week of December 30, 1966, were you employed by the Department of the Interior at that time?

A. Yes, I was.

* * *

Q. And what did your duties entail?

A. Supervising the maintenance of both horticultural and grounds maintenance, facilities maintenance, and activities, of the National Capital Parks area.

MR. SHINNICK: Your Honor, if I may, I have brought a map along which I would like to have marked as Defendant's Exhibit 2 for identification.

THE COURT: Yes.

(Whereupon Defendant's Exhibit

Number 2 was marked for identification.)

BY MR. SHANNON:

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Q. Could you tell us what that map purports to be?

A. This is the National Capital Parks System. At that time -- my job during that week -- I had supervisory control over the area roughly from the Potomac River over here down to Rock Creek Parkway, up to Florida Avenue and on over to roughly the area over by the Anacostia River.

You will note all the little green spots indicate those areas of National Parks Service. Each green spot is a conservation or a park area.

Q. In addition to what you have described as park areas, did you have any roadways that were under your organization and control for maintenance purposes?

A. Yes, such as Constitution Avenue and the Mall area. There is roughly seventeen miles of roadway.

Q. And did you have any sidewalks which fell under your jurisdiction and control for purposes of maintenance?

A. Yes.

Q. Approximately how many miles of sidewalk fell under your jurisdictional control?

A. Roughly, at least seventy miles.

Q. This is your entire responsibility for maintenance purposes?

A. Yes.

Q. Would you be able to tell us, or do you have an approximation, of how many different parks you were in fact responsible for?

317

A. Approximately about one hundred and fifty.

Q. Is the George Washington Monument one of those parks that you are responsible for?

A. Yes, it is.

Q. The ellipse across the street?

A. Yes.

Q. Mr. Lynch, there has been testimony in this case that during the week of December 30, 1960, there had been a snowstorm, snow ending, I believe, the afternoon of the 28th at approximately four p.m.

Would you tell us what your maintenance-- First of all, what pieces of equipment you had by way of maintenance equipment, snow removal, and sanding and salting operations, during that week?

A. We have five snow plows which are mainly for the street control. We have one tractor without a plow and it's for sidewalk control.

In addition, we have other pickup trucks which carry sand, and the larger dump trucks which carry sand also.

The pickups can be used on sidewalks for spraying the sand and the large trucks can be used on the street.

There is also one jet sander which is an automatic type of truck which as it goes along will spread the sand and salt out along the street.

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We also have shovels and other minor equipment.

Q. Approximately how many people did you have reporting to you? When I say people, I mean people who were doing snow removal and sanding work during that week?

A. Approximately fifty.

Q. Will you tell us what deployment of your men you made as a result of the snow which occurred on December 28th? By that I mean, how did you send your men out to clear the snow?

A. On December 28th?

Q. Yes, on December 28th.

* * *

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A. You deploy men first for vehicular traffic or on the roadways. Then you also use men for clearing sidewalks in high pedestrian walking areas. And then if you are able to complete those tasks you deploy men into other minor traffic areas.

THE COURT: Well now, you say high pedestrian areas. What do you mean by that? What would you consider a high pedestrian area?

THE WITNESS: Where we can be absolutely certain - in the downtown parks there would be pedestrian traffic going across to work; in the monument areas where there is pedestrians, there is quite a bit of tourist visitation to those areas.

320

And by this breakdown of one, two and three, this will usually occur simultaneously. We don't do the streets and then go to the sidewalks. There are enough men that it will occur simultaneously.

THE COURT: You said one was vehicular traffic, and two was clearing the sidewalks in high pedestrian areas, and what was the third?

THE WITNESS: Well, actually right in there would be also the White House.

BY MR. SLEETHICK:

Q. In your priority listing, is the White House before or after the high pedestrian traffic areas?

A. Before.

Q. Is my understanding correct, then, that in your priority vehicular traffic -- clearing the streets -- would come first?

A. Yes.

Q. Second would be clearing the White House area?

A. Correct.

Q. And then in your priority would be clearing areas of high pedestrian traffic?

A. Yes.

Q. Am I also correct in understanding, Mr. Lynch, that the different tourist spots --namely, Smithsonian, Washington Monument -- keep counts as to the number of visitors daily?

321 A. Yes, they do.

Q. And from your knowledge of this, you know where more tourists are going -- say, Smithsonian have more than are going to say, Jefferson Monument?

A. Yes.

Q. Is that what you mean by count?

A. Yes, for high pedestrian areas.

Q. Was there also within your jurisdiction at that time sidewalks, maybe adjacent to parks, which are known to you to

contain heavy pedestrian traffic so far as people going back and forth to work, people getting off of buses and possibly using those sidewalks?

A. Yes, there are. Just as an example -- many of the parks and Pennsylvania Avenue, there are people shopping and going back and forth to work across those parks.

Q. And those areas are known to you at the Parks Service as being what you call high pedestrian traffic areas?

A. Yes, they are.

Q. Is my understanding correct, Mr. Lynch, that a Mr. James Leistner was one of your foreman back in December 30th, 1966?

A. Yes, he was.

THE COURT: What is his name?

MR. SHINNICK: James Leistner -- he was the gentleman that was here last time we were in session.

322

THE COURT: Yes.

BY MR. SHINNICK:

Q. Did you have other foreman working for you at that time?

A. Yes.

Q. Approximately how many, if you recall?

A. At least three.

Q. Three others?

A. Yes.

Q. Total of four?

A. Yes.

Q. And was it Mr. Leistner's usual responsibility at that time to do the maintenance snow removal and sanding work at the George Washington Monument?

A. No, it was not.

Q. And whose responsibility was it, if you recall?

A. It was a Mr. Day.

Q. Is my understanding correct that Mr. Day has since retired from the National Parks Service?

A. Yes, he has.

Q. There has been testimony in this case, Mr. Lynch, that the clearing of the snow, that fell on the 28th, from the George Washington Monument was accomplished by Mr. Leistner sometime late in the afternoon of the 28th at which time he put down sand and calcium.

Do you know whether or not anything additional was done
323 by way of maintenance on the George Washington Memorial grounds between the afternoon of the 28th and the morning of the 30th of December, 1966?

A. I don't remember.

* * *

MR. SHINNICK: My question will be, Your Honor, does
324 Mr. Lynch know if any maintenance work was done on the George Washington Memorial grounds after the morning of December 30th, 1966.

* * *

A. Yes. At approximately noon on December 30th there was additional salt, or calcium and sand, put out on areas of the Washington Monument and I believe some ice chipped away.

Q. Do you happen to know who it was that you delegated to do that work -- or, did, in fact, a request come through your office?

A. A request came through my office and I in turn instructed my foreman to oversee the additional maintenance work.

Q. And your recollection is that this took place at approximately noontime on the 30th -- I know you can't be exact but just give us your best recollection.

A. Yes.

Q. Approximately the 30th -- right. Mr. Lynch, calling 326 your attention to, and I show you, Plaintiff's Exhibit 4 in evidence, which purports to be a picture of the sidewalk leading from the parking lot upward to the George Washington Monument, and ask you if you recognize that, sir?

A. Yes, I do.

Q. Calling your attention to the sidewalk which appears in that picture leading up to the Monument, can you tell us what its approximate width was on December 30, 1966?

A. Between five and six feet.

Q. Can you recall whether or not at that time it was higher in the middle and sloped to the sides?

A. Yes, it did.

Q. And can you recall back at that time, back in December 1966, the 30th in particular, if that sidewalk was actually on a slight slope leading up to the Monument?

A. Yes.

Q. I will show you where an X has been marked at the foot of a gentleman in a dark suit, about two-thirds of the way down that hill and ask you to look at that particular area, and ask you if you are familiar with that in general?

A. In general, yes.

Q. Is that a sloped area?

A. Slightly sloping -- from the picture it appears to slope.

* * *

327 Q. Mr. Lynch, would you tell us now what your crews, or fifty men, or four foremen, whether or not they did accomplish snow removal in the area that you are responsible for -- the area that you described to us -- by the morning, by noon on December 30, 1966, or were they in fact still working at snow removal?

A. They were still working at snow removal.

Q. Is my understanding correct that after the snow had fallen on Wednesday that your snow plows were out clearing the street -- some men were delegated to high pedestrian traffic areas of sidewalks, some to the White House, some to the Washington Monument as we know, and that your men continued to work at snow removal, sanding and salting and calcium, at least through noontime on December 30, 1966?

A. That's correct.

* * *

CROSS EXAMINATION

BY MR. TAUSIG:

Q. Mr. Lynch, when you testified that you recall that after the morning of December 30th, meaning the afternoon of December 30th, additional maintenance work was done on the Washington Monument grounds, isn't it a fact that that additional work was done in the concession area?

A. I don't believe that would be correct. It was done in the concession area but also throughout the Washington Monument areas shortly after noon.

Q. And how do you know that, sir?

A. Because we sent men out at approximately twelve-fifteen to check the areas at the George Washington Monument.

Q. And when did they return, do you know?

A. No, I don't.

Q. Have you looked at any records to refresh your memory as to what happened on the afternoon of the 30th of December?

A. I made a statement in connection with this incident I believe back in April of that year.

MR. TAUSIG: Do you have that statement, Mr. Shinnick?

MR. SHINNICK: Yes, I do.

MR. TAUSIG: May I see it?

MR. SHINNICK: Does Your Honor direct me to--

THE COURT: Yes.

MR. TAUSIG: Thank you.

BY MR. TAUSIG:

Q. Mr. Lynch, this statement refers to--

MR. SHINNICK: Might we have --- excuse me for interrupting, Your Honor. Might we have this exhibit marked?

329

THE COURT: Yes, certainly.

(Whereupon Plaintiff's Exhibit Number 14 was marked for identification.)

BY MR. TAUSIG:

Q. Mr. Lynch, this statement refers to the fact that a radio call from a dispatcher reported that there was icy spots on a sidewalk around the George Washington Monument Lodge House. Where is that, sir?

A. Well, the Lodge House is along Fifteenth Street between Constitution and Independence Avenue.

Q. That is not near the Sixteenth Street oval, is it, sir? Sixteenth Street parking area?

A. I would call it near.

Q. Well, let me put it this way: You say the Washington Monument Lodge House is on Fifteenth Street, is that correct?

A. Yes.

Q. So the Washington Monument Lodge House is -- if I am wrong correct me -- the concessionaire area, is that correct?

A. Yes.

Q. And that is on the other side of the Monument from the sidewalk shown in the exhibit Mr. Shinnick just showed you?

A. One quarter of the way around, I believe, or one third.

Q. Now, this statement which you made on April 4, 1967,
says that when you returned to your office you checked with Mr.
330 Leistner and found that he had been unable to locate the men to
correct the situation at the Monument Lodge House.

Consequently, two men were immediately dispatched to remove the ice. They chipped ice off and then spread sand and calcium to prevent subsequent re-freezing.

As I understand your prior testimony, what you have said here today is based upon your recollection as it was refreshed by this memorandum you wrote on April 4th, is that correct?

A. In part, yes.

Q. Well, do you have any other records from which you have refreshed your memory to substantiate your statement today that you sent men on the 30th day of December 1930 (sic) to correct an

icy condition on all of the general area of the Washington Monument?

A. I have no records, no.

Q. It is a fact, is it not, you have read the memorandum recently, have you not?

A. Yes, I have.

Q. And this memorandum simply says that you dispatched two men to the Washington Monument Lodge House to correct the icy condition there -- isn't that all this memorandum says?

MR. SHINNICK: I object, Your Honor. The memorandum speaks for itself.

MR. TAUSIG: I would like him to answer the question, Your Honor.

331 THE WITNESS: It says I sent two men to the Lodge House.

BY MR. TAUSIG:

Q. Does it state that you sent men to any other place on the Washington Monument grounds?

A. If it is the memorandum--

Q. Well, will you look at the memorandum and tell us, please.

A. It doesn't say specifically that they didn't cover the entire Monument, no, but when we dispatched men to an area, especially during the snow and ice removal, they will check the entire area as far as--

Q. Alright. Let's get back in time. When you say that, in this memorandum, that you returned to your office or to the yard shortly before noon, do you recall that?

A. Yes.

Q. And you did testify, did you not, that you found that you then dispatched two men at that point to the Washington Monument grounds, to the Monument Lodge House, is that correct?

A. Yes.

Q. Did you not say that their work was completed by twelve fifteen?

A. No, I did not say that.

Q. What did you say about twelve-fifteen?

A. I said that approximately then was when we sent them
332 to the Washington Monument.

Q. And when did they complete their work?

A. I don't know.

Q. Mr. Lynch, you testified that you had been employed in your capacity of horticulturist or maintenance supervisor. I believe you are now the Personnel Specialist, for two and a half years, is that correct?

A. Yes.

Q. And as Personnel Specialist are you doing the same type of work as in December 30th, 1966?

A. No, I am not.

Q. When were you first employed as a horticulturist specialist?

A. July, 1966.

Q. How long did you have the same type of duties?

A. One year.

Q. So in other words, you had one winter, is that correct?

A. That's correct.

333 Q There has been testimony in this case that there was a six and a half inch snowfall in the Washington area on December 24th.

Do you know when such snow was removed from the walkway shown in the exhibit --- the photograph that Mr. Shinnick has shown you --- after the 24th of December?

A Exactly I couldn't say.

Q Approximately?

A Approximately December 25th.

Q There has also been testimony, as Mr. Shinnick has indicated to you, that there was at one point eight inches of snow on December 28, 1966.

Is it correct that you sent your men immediately after it stopped snowing on the 28th?

A Yes.

Q And you had fifty men on the 24th, and fifty men on the 25th, and fifty men all the way through the week of December the 30th?

334 A I couldn't pinpoint that. It would vary. The 25th was Christmas and--

Q Well, your employees approximated fifty during that entire week, did they not?

A I would say so, yes.

Q Mr. Lynch, in your direct examination you stated in answer to Mr. Shinnick's question that this walkway which he showed you in the photograph was slightly crowned, is that correct?

A Yes.

Q. You said that even though it is slightly crowned, that because the one side of the walk is higher in elevation than the other side of the walk, that water runs across that walk and freezes after a snow; that the temperature first causes the snow to fall and then causes it to freeze?

A. I know that water does on most sidewalks, will start to creep across as snow melts and then refreeze if the temperature drops. Whether the Washington Monument sidewalk is higher or not I don't know.

Q. You don't know whether the water could run across that walkway or not, is that correct?

A. It would run on part of the sidewalk. I don't know if it would run clear across.

Q. You don't know one way or another?

A. No.

* * *

337 MR. SHINNICK: At this juncture, Your Honor, the government rests.

THE COURT: Alright.

MR. TAUSIG: Your Honor, I think, has this motion pending. I suppose you want to hear argument. If Your Honor grants the motion I have a gentleman from my office who is sitting outside who will read the portions of the deposition that we want to put in evidence.

* * *

338 MR. TAUSIG: With respect to the memorandum of law prepared by Mr. Shinnick, I would first like to say that I have been through all of the cases, which are very few, cited in the Federal Rules decision, Rule 26(d)5.

(Whereupon Mr. Tausig made an argument on Rule 26(d)5 and the admission of the deposition testimony in question, followed by argument by Mr. Shinnick, which ended as follows:

MR. SHINNICK: I don't think we can introduce these depositions with the witnesses available --- they are on telephone notice --- and since they are under subpoena by the plaintiff.

I won't proceed further, Your Honor.

THE COURT: Well now, I think that every trial
339 should be a search for the truth, and if it is any problem that these depositions are offered in rebuttal, why the court, even at this stage, may allow the plaintiff to reopen her case to the extent of presenting them on direct rather than in rebuttal.

Of course, if you did, that would give you an opportunity to come back if you wished to.

Now, I had thought the witnesses, whose depositions the plaintiff wishes to introduce, had a remarkable memory deficit. That is the way it seemed to me.

I may be mistaken in that because I realize these men have this same problem over and over and over of looking after the streets in this area, but at the same time, I am surprised at the extent of the loss of their memory.

And as for the attorney for the plaintiff failing to talk to these witnesses in advance, after all these were government employees and they had given the statements under oath before, and I am not surprised that he would feel that under this situation that he could rely upon them to testify accordingly.

But as I say, they do have this memory failure to a considerable extent, and since they had, I think that that circumstance furnishes this condition which number five of subdivision three of this Rule 26 refers to.

In other words, that under this these are exceptional circumstances and in the interest of justice the deposition should come in.

340

THE COURT: Let me ask you first -- on this question of whether it goes in on direct or rebuttal. What are your views about that?

MR. TAUSIG: It's immaterial to me, Your Honor, and as far as I am concerned it can come in as plaintiff's direct.

341

THE COURT: Very well, that's the way it will be.

342

MR. TAUSIG: May the record show, Your Honor, that I tender into evidence the following parts of the deposition of Officer Robert I. Good, which I took on September 7, 1967:

All of page 2 to the end of the first answer.

All of page 3.

Page 6 starting with the third question: "Now, you said a few moments ago . . ." et cetera, to end of first answer on page 12.

343

Page 17 starting with the third question: "Do you of your own knowledge know . . ." et cetera, to end of last answer, page 18.

Page 24, starting with the last question on the page: "Now I ask you to assume . . ." et cetera, to end of first answer on page 25.

Page 26, starting with the second question: "Well, I am not trying to put words . . ." et cetera, to end of answer to that particular question.

Page 28, the first two questions and the first two answers.

Now, what I have just specified is on direct examination by Mr. Tausig.

I also offer in evidence from the deposition of Robert I. Good the following cross examination by Mr. Shinnick:

Page 41, starting with the first question: "How long was it . . ." et cetera, to the end of the third answer, page 42.

Page 43, starting with the first question by Mr. Shinnick through last answer on page 43.

Page 45, the last question and the last answer.

Page 46, starting with the next to the last question on the page: "And did you view . . ." et cetera, to end of first answer, page 48.

Page 51, the third question and the third answer on page 51.

344

I also offer in evidence the following testimony which came in on redirect by Mr. Tausig.

Page 56, starting with the third question on the page: "Well, in other words . . ." et cetera, to end of first answer on page 57.

Page 57, starting with the next to last question: "All right, sir . . ." et cetera, to end of second answer, page 58.

Page 58 --- all of that page.

Now with respect to the deposition of W. Franklin Stevens, I offer the following testimony which came in on direct examination by Mr. Tausig:

Page 61 -- all of this page to the end of the first answer on page 62; and for clarification, the commencement of that answer begins at the bottom of page 61 and continues on to the top of page 62.

Page 66, starting with the third question: "Now, did your assignment . . ." et cetera, to the end of the third answer, page 67.

Page 79, starting with the second question: "Do you recall . . ." et cetera, to the end of the third answer on page 79.

Page 80, starting with the third question: "Did you inspect . . ." et cetera, through end of the last answer on page 80.

Page 81, starting with the fourth question on the page:
345 "What condition did you find them in . . ." et cetera, to the end of the fourth answer, page 87.

Page 89, starting with the fourth question on that page through the answer to that fourth question.

Page 91, starting with the last question on the page: "Do you have any knowledge . . ." et cetera, through the first answer on page 92.

Page 94, starting with the second question: "Now, you made a statement . . ." et cetera, to the end of the last answer on page 94.

Page 100, starting with the last question on the page: "Has it been your experience . . ." et cetera, to the end of the fourth answer on page 102.

I also offer in evidence the testimony which came in on cross examination by Mr. Shinnick as I am now about to specify.

Page 118, starting with the first question: "Did Mr. Bernstein have occasion . . ." et cetera, to the end of the first answer, page 119.

Page 130, starting with the last question on the page: "Did you have any further conversation . . ." et cetera, through the first answer on page 132.

Page 134, starting with the fifth question: "When you characterized . . ." et cetera, through page 135.

Page 138, starting with the second question on the page: "Do you recall . . ." et cetera, through the last answer on page 139.

* * *

347

1:45 p.m.

AFTERNOON SESSION

MR. SHINNICK: Is my understanding correct, Your Honor, that at this point you wish me to call the court's attention to the parts of the deposition that I feel are not admissible for various reasons?

THE COURT: Yes.

MR. SHINNICK: If it would be agreeable with Your Honor, we will start in the order that Mr. Tausig has suggested.

THE COURT: Very well.

MR. SHINNICK: And that would be that page 2 of the deposition of Robert Good, page 2 to the end of the first answer which appears on page 3, has already been testified to when he was called on his direct examination.

MR. PAUSTIC: I agree to that, Your Honor, but to read into evidence, you are just reading cold from a page and it is just to show the continuity -- that's the reason I asked for that.

If Your Honor can pick up the text on page 6, he has testified to what is on page 2 and which is answered on page 3.

THE COURT: Well, I don't think that is any real objection. I will overrule it.

MR. SHINNICK: On page 6, the questions called for are hearsay and are leading.

THE COURT: Which part of that?

MR. SHINNICK: The questions, Your Honor, from page 6
348 through page 12.

THE COURT: Yes. He begins telling us at the top of page 7 what he saw: "I then went to Seventeenth Street and Constitution Avenue and made a call to the dispatcher," and so forth.

Wait a minute. Now, down at the bottom of page 6 he says: "I made a check and checked the sidewalk coming down from the north slope of the Monument to the parking lot around the parking lot itself."

MR. SHINNICK: Right. That answer, Your Honor, is leading. Part of the answer he gave to the question, he starts

to answer with: "Well, he said that," and by "he" I believe he is talking about the witness who has testified, David Kaplan.

I must admit that bits and pieces as we go through this are in fact eye witness testimony and other portions are quite obviously hearsay.

MR. TAUSIG: I don't think they are hearsay, Your Honor. I asked him the question: Was the slippery condition called to his attention. That is neither a leading question nor is it hearsay. He testifies as to what somebody told him.

I am not introducing it as to the truth of the condition, what the man said. I am simply asking him how the dangerous condition was called to his attention.

MR. SHINNICK: If that, in fact, is all he is after the answer quite simply is: "David Kaplan" and everything else after that would not be responsive to the question asked.

THE COURT: Well, I think this part beginning on page 6 down to where the witness begins to answer could come in as a statement that he says was made and not for the truth of it.

MR. SHINNICK: Do I understand then that takes us--

THE COURT: That takes it down to the bottom of page 6.

MR. SHINNICK: And does Your Honor include in that also the continuation of the answer on the top of page 7?

THE COURT: Yes.

MR. SHINNICK: Alright. The next question by Mr. Tausig, the first question on the top of page 7, quite obviously is elicited hearsay, based on what the witness, David Kaplan--

THE COURT: Well now, I am not at all sure that this is hearsay. The law requires that you have notice. Now is

anybody going to prove that you have notice unless you can show what was told, if an act is in issue, and this is in issue.

MR. SHINNICK: The witness, David Kaplan, has already testified, Your Honor.

THE COURT: Well, he has testified but this is the testimony of this witness.

MR. SHINNICK: I believe this witness has already testified to the fact that he talked with Mr. Kaplan and what he did as a result of the conversation he had with Mr. Kaplan. Mr. Kaplan has been asked, as I recall, in his testimony, what in 350 fact he said to the Officer, and he has responded on the record with what he had said to the officer.

THE COURT: Well, on the question of notice, I think what this page 7 down to Mr. Shinnick's objection, may come in for the purpose of showing that, bearing on notice, and not for the truth of it.

MR. SHINNICK: Do I understand that Your Honor then has ruled that page 7 through my objection at approximately the middle of the page is admissible but the remainder of page 7 is not admissible?

THE COURT: I didn't get the last--

MR. SHINNICK: Is Your Honor ruling that the part after my objection--

THE COURT: Well, I haven't read that yet. I am just getting to that.

Well now, I think what the witness says about he stated that someone else had slipped on the ice and that is how it came to his attention -- I will strike that.

MR. SHINNICK: Well, then I will just draw a line.

MR. TAUSIG: Yes, fine.

THE COURT: And that would take it to Mr. Tausig's rejoinder, "I see."

MR. SHINNICK: Alright.

THE COURT: Now, the rest of that--

MR. SHINNICK: The rest of that page, in Your Honor's ruling, is admitted?

351 THE COURT: Yes.

MR. SHINNICK: I just call the court's attention to the fact that no time has been established as to when this inspection had taken place. It seems to be just general talk about an inspection rather than pinning it down to a particular time.

THE COURT: Well, the question says: "Now, you say that you then went to the walkways surrounding the Monument and inspected them, is that correct?" That follows from what has theretofore been said.

I will overrule the objection -- if that is an objection.

On the next page, page 8, Mr. Shinnick says: "What time is this -- ten-thirty?"

MR. SHINNICK: And Mr. Tausig then says: "At the time he inspected--"

THE COURT: --"which I understand he is estimating around ten-thirty."

MR. SHINNICK: The witness goes on to say that he had estimated from ten-thirty to eleven there was ice on the parking lot in spots and there was ice on the sidewalk.

THE COURT: Yes, that will stand.

MR. SHINNICK: You have admitted that, Your Honor?

THE COURT: Yes. Now all the rest of that is only based on his observation, the rest of that page.

Where is your next objection?

MR. SHINNICK: Well, I object to all of that material. I don't want to...

352 THE COURT: Alright. I will let in all of page nine.

MR. SHINNICK: All of page 9?

THE COURT: Yes. There is nothing there that is hearsay that I can see.

MR. SHINNICK: If my recollection serves me, at the time of the deposition, Your Honor, the witness had before him a picture -- I believe it is number 4, Plaintiff's number 4 in evidence. Do you recall?

I think it might become important at the time of argument, Your Honor, as to whether or not the officer--

THE COURT: I don't think he was. I don't see any reference to a picture.

MR. TAUSIG: I don't think so.

MR. SHINNICK: He was given a picture.

MR. TAUSIG: No. Not to my recollection he was not.

THE COURT: You ended on page 12, didn't you, Mr. Tausig?

MR. TAUSIG: Yes, to the end of the first answer on page 12.

THE COURT: Yes. Where do you go from that?

353 MR. TAUSIG: Page 17, Your honor. Do I understand
that except for that part that you struck on page 7, that you
rule as admissible page 6 starting with the third question to
the end of the first answer on page 1??

THE COURT: Yes.

* * *

357 MR. SHINNICK: No. I say I have no knowledge one
way or another as to whether or not there was sand put down on
the morning of the 30th before 11:45.

I do know, and will certainly stipulate, that sand was
put down subsequent to 11:45.

MR. TAUSIG: If he so stipulates, you can strike
the rest of it, Your Honor, as far as I am concerned.

THE COURT: I understand it's from page 17, the
question beginning: "Do you of your own knowledge . . ." and
then what follows through page 18, all of that is to come out,
is that right?

MR. TAUSIG: Just one moment, Your Honor. Yes,
that's right, Your Honor.

THE COURT: Alright. Now, what is next?

MR. TAUSIG: The next place, Your Honor, is page
24, starting with the last question.

MR. SHINNICK: On the bottom of page 24, Your Honor
Mr. Tausig asks the witness to assume the weather report shows
certain facts about a certain number of inches of snowfall, and
then bases his question on that assumption.

358 THE COURT: Well, don't these records that you
put in so show?

MR. TAUSIG: Precisely, Your Honor. And also the document --- that weather report marked as Plaintiff's Exhibit 2 for identification --- and it was attached to this deposition and was shown to the Officer and Mr. Shinnick.

MR. SHINNICK: I will not disagree with Mr. Tausig about that. One of the things is that an eight inch snow fell, but in addition to that the weather report says that freezing precipitation fell and that drizzle and rain fell, and it also shows temperature changes.

Now, if Mr. Tausig would be allowed to take one of those things out, ask a witness to assume it, and base an answer on it, it would certainly be improper.

THE COURT: Well, he says, "The question was, when you inspected the sidewalks around the Washington Monument on December 30th, was there such snow on the sidewalks, that amount of snow on the sidewalks at that time?"

The witness answers: "No. The sidewalks were clear. There was apparently, I guess, water or something had drained across the sidewalk in spots and had frozen up. The sidewalks were clear. Like I say, there was water on it where it had frozen and made ice spots."

So he talks about the condition of the sidewalks.

MR. TAUSIG: All I was trying to ascertain from 359 him, Your Honor, was whether the snow was on the sidewalk and he answered no, it was not.

MR. SHINNICK: If that's all, I can stipulate that.

But the sidewalk the witness is talking about has not been ascertained to be the sidewalk here in question and my in-

formation secured from Mr. Tausig reminding me, is that the witness up to this point had not been shown the picture which is in evidence.

MR. TAUSIG: He had not been shown the picture but he had previously described in this deposition the sidewalk which he examined. The deposition will show that this is the sidewalk shown in Plaintiff's Exhibit Number 4 in evidence.

THE COURT: I will let these answers on pages 24 and 25 stand.

MR. SHINNICK: Might I just note my objection as to Mr. Tausig's characterization of what the witness understood? Namely, that he understood where the sidewalk was, where the accident had taken place, and was in fact testifying about that sidewalk.

MR. TAUSIG: I didn't say that. The fact of the matter is that he made his call at 11:33. That was several minutes before Mrs. Bernstein fell.

What I said was that this deposition testimony will show that the officer in describing this particular walk on page 25, the walk he examined after Mr. Kaplan told him the walk was in a dangerous condition, and the deposition testimony will show by reading it that that's the same walk upon which Mrs. Bernstein subsequently fell.

360
MR. SHINNICK: Might I ask Your Honor's permission to have Mr. Tausig show us at this point what evidence there is in the deposition of the officer's understanding of where she fell?

MR. TAUSIG: I said she hadn't fallen yet.

MR. SHINNICK: Not so much whether she had or had not fallen but as to where she had fallen.

THE COURT: Where do you go from page 24 and 25?

MR. TAUSIG: I go to page 26, Your Honor, starting with the second question: "Well, I am not trying to put words in your mouth . . ." to the end of the answer to that particular question.

THE COURT: Do you want to say anything about this?

MR. SHINNICK: Yes, Your Honor, I do. Mr. Tausig says it for me in the deposition, when he says, "Well, I am not trying to put words in your mouth."

And he goes on, Your Honor, at the end of page 25, the questions immediately preceding, I think the witness has evidenced a lack of understanding about what was done, and has further evidenced a lack of recollection about what the conditions were like, and over on page 26, just to pick out a question which is obviously leading, and to pick out an answer without anything descriptive as to where the officer is talking about or what time he is talking about, or in fact the extent of his recollection, I think is prejudicial.

If Your Honor would, if I might just show you Plaintiff's Exhibit Number 4, Your Honor, and perhaps we can clear up some of the uncertainty.

There are two sidewalks, in fact. There is the sidewalk that leads from the parking lot up to what might be called the information building.

MR. TAUSIG: Kiosk Building.

MR. SHINNICK: Or Kiosk. And then there is the sidewalk which continues on at that point to lead up to the Monument.

And I believe Officer Good here is talking about the seventy-five yards of sidewalk which is closest to the parking lot. That appears more clearly at the bottom of page 26 in response to a statement that I interjected during the questioning.

THE COURT: Your question is: "That would be the seventy-five yards closest to the parking lot?"

MR. SHINNICK: Yes, Your Honor, that is correct.

THE COURT: And Mr. Tausig says: "Correct."

MR. SHINNICK: Right.

THE COURT: The witness: "From the parking lot up, starting up the slope to the Monument?"

362 MR. SHINNICK: That's correct, Your Honor. And the witness goes on to say: "There again, I couldn't say just exact."

And Mr. Tausig goes further: "Approximately, to the best of your recollection." And the witness says: "I can't even remember. It's been so long, back in December."

I think it is very clear that the witness did not have a recollection.

THE COURT: I don't think we can take this witness's testimony and say what he had in mind. I think you have to read carefully what he says and just what his background was and what he was saying.

MR. SHINNICK: That's all I would say, Your Honor. If Your Honor has made a decision to let this testimony in, then

I think it ought to be read in its entirety, Your Honor, as to what the witness is talking about.

THE COURT: What do you want to do -- do you want to offer the rest of it in?

MR. SHINNICK: No, Your Honor. I think it is error to have that in and I don't want to be misunderstood on that point.

THE COURT: The rule is that if you have the part that the other side has in and it is not complete, then you can put in such other parts as you may wish.

You are complaining here but at the same time say there's 363 isn't anything that you want in.

MR. SHINNICK: I will say this, Your Honor, that during the case I put in a call to the Park Police Headquarters, during the recess, to ascertain the availability of Officer Good and Officer Stevens and they are available.

THE COURT: They are available but without memor-
ies of much of what they knew when they gave the deposition.

MR. SHINNICK: And what they said in the deposition, Your Honor, on numerous times was: "I don't know, I can't remember."

THE COURT: That is still in here.

MR. SHINNICK: It was only after much drudgery, much leading questions, that we began to pull out of them some bits and pieces of what might have happened.

And I think to have Your Honor only look at the bits and pieces without looking at the entire deposition, the witnesses did not have a recollection, and witnesses who were responding

to leading questions -- I think it would best be done by a reading of the entire deposition.

- But that is only a basis for my objection --- Mr. Tausig picking out selected questions and asking Your Honor to read selected questions.

THE COURT: Well, that is done every day of the week --- except Saturday and Sunday -- in this court where people pick out a part of a deposition that they want.

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MR. SHINNICK: The only thing that makes it peculiar in this situation is that the witnesses have testified and are available.

THE COURT: I don't think that is very relative here when they have lost their memory of many of the details they knew when they gave the deposition.

MR. SHINNICK: I won't try to argue with Your Honor but on page 27 is an example -- "I can't even remember, it's been so long, back in December."

THE COURT: There is nothing on page 27 that Mr. Tausig is trying to get in that I know of.

MR. SHINNICK: No, Your Honor, but it follows what was on page 26.

THE COURT: Well, alright. We have to make progress here. I will overrule the objection to what is on page 26.

Now the next page?

MR. TAUSIG: Page 28, Your Honor -- the first two questions and the first two answers.

THE COURT: Alright. Do you want to say anything about that, Mr. Shinnick?

MR. SHINNICK: Just what I have already said, Your Honor. It seems to refer to roadways.

THE COURT: it is talking about the boat of the Washington Monument.

MR. SHINNICK: Yes. The officer so testified to earlier, was a motor cycle officer.

THE COURT: Alright.

MR. SHINNICK: Mr. Tausig's characterization of the boat as the Washington Monument. His boat includes the Washington Monument among other areas of the city.

THE COURT: I will overrule the objection to what is on page 28.

MR. TAUSIG: Next page, Your Honor, is page 41, where Mr. Shinnick is cross examining. It starts with the first question: "How long was it . . ." on through page 41 to the end of the third answer on page 42.

MR. SHINNICK: Then to save Your Honor's time I might state that the objection here would be the fact that I was doing the questioning and it was cross examination, as Mr. Tausig has testified to.

THE COURT: Alright. I will overrule the objection to the part that has been offered on pages 41 and 42.

MR. TAUSIG: Next page, Your Honor, is page 43, starting with the first question by Mr. Shinnick through the last answer on page 43.

MR. SHINNICK: Just the same thing, Your Honor -- this was on my cross examination, and from the few questions that appear here it is not clear as to what portion of the sidewalk the officer was talking about.

THE COURT: Alright. I will admit the part offered
366 on page 43.

MR. TAUSIG: Next page, Your Honor, is page 45 --
the last question and the last answer. This is still cross ex-
amination by Mr. Shinnick.

MR. SHINNICK: Same objection, Your Honor.

THE COURT: Mr. Tausig, is that after the fall or
what?

MR. TAUSIG: Well, this answer says: "Yes, I did
return in the afternoon and there had been sand brought out."
That afternoon was after 11:45, Your Honor.

THE COURT: Well, that falls in that area of what
they do subsequent to the time.

MR. TAUSIG: Yes, I agree.

THE COURT: So I will strike what has been asked
for on page 45.

MR. TAUSIG: Next is page 46, Your Honor, starting
with the next to the last question on the page: "And did you
view . . ." to the end of the first answer on page 48.

THE COURT: 46, isn't it?

MR. TAUSIG: Starting on page 46, to the end of
the first answer on page 48.

MR. SHINNICK: I think the thrust of the questions
here, Your Honor, is to have the witness give an opinion as to
how long it usually took the crews doing the sanding and salting
work at the Monument to accomplish the job, and it is just that.

367 It is a request for an opinion and that is what in fact the wit-
ness gave.

THE COURT: Well, the first part of that beginning on page 46 to finally on page 47, he gives an answer about sand in the Sixteenth Street parking lot itself and the sidewalk leading from the north slope of the Monument down to the south end of the parking lot.

Is there anything else there particularly that you want?

MR. TAUSIG: No, Your Honor. I am willing to have that taken out.

THE COURT: Alright. Pages 46, 47 and 48 are stricken, the parts asked for.

MR. TAUSIG: The next thing is page 51, Your Honor, the third question and the third answer.

MR. SHINNICK: Some objection here, Your Honor. The witness is asked for his recollection of the chipping of the ice that he saw up there and he gives a responsive answer to that question. The question does not pinpoint the area being referred to.

THE COURT: What about that -- where is this area fixed. You say, "getting back to the ice spots," on page 51.

MR. TAUSIG: Well, you will have to go back and I will have to pick it up for you, Your Honor.

Cross examination, Your Honor, on page 41. It is a
368 continuation of cross examination by Mr. Shinnick. You see, his cross examination started on page 37 and then this is a continuation of it.

Down at the bottom of the page, page 41, Mr. Shinnick said:

" Q. Can you tell us the approximate period of time that you viewed the sidewalk area? Was it approximately 30 seconds, 10 minutes, or your best recollection of that.

A. Well, I'd say maybe approximately five to ten minutes, because I did -- well, let's say approximately five minutes, because I got off the motor cycle. I walked up the sidewalk to the sidewalk and checked around and came back down.

Q. Can you recall approximately how far up the sidewalk you walked?

A. Well, I walked I'd say almost to the top.

Q. When you say to the top, do you mean to the curve?

A. I should say almost to the end of the sidewalk before it hits the circle at the base of the Monument.

Q. Is that the curve we were talking about before -- approximately seventy-five yards up when you hit that curve?

A. Right. In other words, you walk approximately seventy-five yards and then you make -- say if you were going to the Monument, you would turn to the east, or to the left, and walk up the slope to the Monument. I walked almost to the top and then I came back down."

Now, that's in evidence, Your Honor.

MR. SHINNICK: On page 51, Your Honor, the only question there appearing is: "Getting back now to those icy spots that you viewed on the sidewalk, could you tell us their approximate geometrical shape?"

It does not state with any type of particularity whether it is the area of the sidewalk, or that where it slopes to come up to the Monument, so the question and answer as given here do not state what in fact the witness is referring to, or, as a matter of fact, what the questioner is referring to.

MR. FAUSIG: If we can go back again, I will pick out the other part from the time he steps off the parking lot to the time he gets near the top of the Monument.

MR. SHINNICK: The only point is, Your Honor, that the questions appearing on page 51 don't do what Mr. Fausig says they do, namely, dealing with particularity the area in question.

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If there are other questions and other answers then maybe he should bring those to our attention.

THE COURT: Well now, on page 25 he says: ". . . there was water on it where it had frozen and made ice spots."

MR. SHINNICK: Is that in the middle of the page where Your Honor is reading? -- "The sidewalks were clear. Like I say, there was water on it where it had frozen and made ice spots."

THE COURT: Yes, yes.

MR. SHINNICK: It still does not appear where on the sidewalk the witness is referring to.

THE COURT: Well, he covers that several times. He talks about the walkway going down from the Monument and--

MR. SHINNICK: Do I understand that Your Honor is overruling my objection as to the question on page 51?

THE COURT: Yes.

MR. TAUSIG: The next part, Your Honor, is redirect by Mr. Tausig, page 56, starting with the third question on the page: "Well, in other words . . ." to the end of the first answer on page 57.

MR. SHINNICK: This question seems to pertain to whether or not the officer knows if it is usual procedure for the Park Police to have twenty-four hour duty or to have policemen in the area of the Washington Monument, or -- excuse me -- to have officers whose beat includes the Washington Monument twenty-four hours a day.

371 THE COURT: He has answered to his knowledge. He says: "Is that correct?" And witness says, "Yes, sir."

I will allow that to stand and overrule the objection as to that.

MR. TAUSIG: Page 57, Your Honor, starting with the next to last question: "Alright, sir," to the end of the second answer, page 58.

MR. SHINNICK: The questions here seem to pertain to putting down the sand that Officer Good called for at 11:33, and he responded that he would say that it was put down after 11:50.

I believe he has already testified to that. And I believe that Mr. Leistner, the foreman who actually went out there and put the sand down with his crew, testified that it was approximately twelve that the sand was put down so that is in evidence already.

THE COURT: He said: "I would say it would be after 11:30."

MR. SHINNICK: Right.

THE COURT: Are you objecting to that?

MR. SHINNICK: I am objecting to it just because I am generally objecting to everything.

THE COURT: Yes. Well, I will allow it to stay in because it does show that this man noticed it.

MR. TAUSIG: All of page 59, Your Honor.

THE COURT: Alright.

372 MR. SHINNICK: This question seems to be calling for the witness's knowledge of what other officers would do if they were in a similar situation which is in fact speculation on the part of the witness as to what other officers would do.

THE COURT: You don't think this man knew what the routine is about the--

MR. SHINNICK: No, Your Honor. I am saying that those questions on page 59 are calling in fact for the witness to speculate and give an opinion.

THE COURT: It says: "Your duties, your duties."

MR. SHINNICK: It says:

"Q. Now, to the best of your knowledge, are other officers of the Park Police assigned to beats including the Washington Monument, or that include the Washington Monument, also required at other times of the day to inspect the grounds?"

THE COURT: Up above there it says:

"Q . . . You told us that in connection with your patrol that your duties included inspecting the grounds around the Washington Monument, is that correct?"

And he said: "Yes, sir."

MR. SHINNICK: Yes, Your Honor, I have no problem with that. He has testified that on direct examination here in 373 this courthouse already. It is when he gets down to the next question.

THE COURT: One of these officers testified that he went down there with them at one time that something was done, if my memory serves me correctly.

MR. SHINNICK: I recall Officer Good, the man who has testified here, saying that he got off his motorcycle and walked up on the sidewalk.

THE COURT: Well, I will let it stand.

MR. SHINNICK: The entire page 59?

THE COURT: Yes.

MR. TAUSIG: Now, Your Honor, we go to the deposition of Officer Stevens. The first part I offer in evidence is all of page 61 to the end of the first answer on page 62, and by that I mean that the answer begins at the bottom of page 61 and continues on to page 62.

MR. SHINNICK: That material has also been testified to by Officer Stevens here on direct examination.

MR. TAUSIG: I agree with that, Your Honor, but this is purely introductory.

THE COURT: I will allow that to stand, the parts offered on pages 61 and 62.

MR. TAUSIG: Page 66, Your Honor, starting with the third question: "Now, did your assignment . . ." to the end of the third answer on page 67.

374 THE COURT: Well, I don't see any objection to that, Mr. Shinnick.

MR. SHINNICK: It is incomplete, Your Honor.

THE COURT: Alright! What is next, Mr. TAUSIG?

MR. TAUSIG: Is that admitted, Your Honor?

THE COURT: Yes.

MR. TAUSIG: Page 79, starting with the second question: "Do you recall . . ." to the end of the third answer on page 79.

THE COURT: Alright.

MR. TAUSIG: I don't know whether Mr. Shinnick has an objection or not.

MR. SHINNICK: Yes, I have a continuing objection.

THE COURT: What about 80?

MR. TAUSIG: Page 80, starting with the third question: "Did you inspect . . ." through the end of the last answer on page 80.

THE COURT: Yes, I will admit that. Now, you are at page 81.

MR. TAUSIG: Yes, starting with the fourth question on the page: "What condition did you find them in?" to the end of the fourth answer on page 87.

MR. SHINNICK: The same objection here, Your Honor, as to the failure to delineate with any degree of precision or specify the area the witness is referring to when he responds

375 to those questions, and that in his answer the witness says: "That's strictly a guess. I didn't get out and measure them." This is conjecture for the most part.

THE COURT: Things are a guess when it's just their best estimate based upon observation.

Have you said all you want to say about that, this particular section?

MR. SHINNICK: Yes, Your Honor.

THE COURT: Alright. I will overrule the objection.

MR. TAUSIG: Page 89, Your Honor, starting with the fourth question on that page through the answer to that question.

MR. SHINNICK: Before we get to that, Your Honor, is my understanding correct that page 80 has been admitted, pages 81 through 87?

MR. TAUSIG: Through the end of the fourth answer on page 87 Your Honor has admitted.

THE COURT: yes.

MR. TAUSIG: Page 89, starting with the fourth question through the answer to that question.

THE COURT: Do you have any objection to page 89?

MR. SHINNICK: Same objection, Your Honor --- failure to state with any degree of specificity of the area being asked about.

THE COURT: I will overrule the objection.

376 MR. TAUSIG: Page 91, starting with the last question on the page: "Do you have any knowledge . . ." through the first answer on page 92.

MR. COURT: Alright. Admitted.

MR. SHENKICK: Same objection, Your Honor.

MR. TAUSIG: Page 94, Your Honor, starting with the second question: "Now, you made a statement . . ." to the end of the last answer on the page.

MR. COURT: Alright. What is on page 94 may stay in.

MR. TAUSIG: Page 100, starting with the last question on the page: Alright. Has it been your experience . . ." to the end of fourth answer, page 102.

MR. SHENKICK: If I might, Your Honor, in an attempt to be helpful, I would call the court's attention to page 95 where in response to Mr. Tausig's question beginning on the bottom of page 94, he says:

"Q. Now, when you say that condition had been found to be the same during or ever since it snowed, who made that investigation?"

And the witness responded:

"A. I couldn't say whether I made it or someone else made it. I do know that the maintenance crews were working in that area particularly every day since it had snowed."

Now, their first concern would be the roadways, not the sidewalks, but the roadways for the vehicular traffic. Then if the roadways were clear to where they were reason-

ably safe, then they would concentrate their efforts on the sidewalks.

Now, as to who made the investigation each and every day after the snow, I couldn't say.

As a prelude to the witness's testimony, he simply doesn't know the answer and he appears to be trying to make them come up with answers to those questions although he had stated on numerous occasions that he could not remember.

And the witness says, on page 97, his question:

"Q. Now, to your knowledge, had those icy conditions on that particular sidewalk been sanded or salted or treated in any way between December 24th 1966 and December 30, 1966?

A. Yes, sir; they had.

Q. How many times?

A. I don't know.

Q. How do you know that they had been?

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"A. Just from visual sight. I hadn't seen the men removing the snow from the sidewalk or putting salt or sand that I can remember."

And then it goes on:

"Q. Well, prior to December 30th, had you observed salt and sand on the sidewalks?

A. I don't remember."

And then he says he can't say one way or the other whether the snow was removed from the sidewalk and sand and salt put on there between December 24th and December 30th.

I won't persist in this, Your Honor, but even during the time of this deposition, the officers simply were unable to remember the conditions that happened on the walk ending December 30th.

MR. TAUSIG: I would just like to say again, Your Honor, that if Mr. Shinnick feels that what he has just read in any way waters down the testimony on page 100, he is free to offer it.

THE COURT: Well, now, we are on page 100.

MR. TAUSIG: Page 100, from the last question on the page to the fourth answer, end of the fourth answer, on page 102, Your honor.

THE COURT: Yes. I don't see any objection to that.

379 MR. SHINNICK: I will have the usual objection on that, Your Honor.

THE COURT: Alright.

MR. TAUSIG: Next part is on cross examination by Mr. Shinnick, starting on page 118 with the first question: "Did Mr. Bernstein have occasion . . ." to the end of the first answer, page 119.

THE COURT: Alright. That may stay in.

MR. TAUSIG: Page 130, starting with the last question on the page --- this is still cross examination by Mr. Shinnick --- "Did you have any further conversation . . ." on through the first answer on page 132.

MR. SHINNICK: I believe, Your Honor, in this particular segment of the deposition we are getting into an area of the availability of alternate routes of the plaintiff, which I don't believe has been made any part of this case up to this point, and I am not sure that it ought to be made part of the case now.

MR. TAUSIG: In that question, Your Honor, Mr. Shinnick, at the close of the plaintiff's original case, made a motion for judgment in favor of the defendant on the grounds that there was an assumption of risk and contributory negligence.

And the case in the District of Columbia in which that becomes an issue, if Your Honor does that I must respond to the subject of contributory negligence or assumption of the risk.

So the question of whether the assumption of risk was reasonable under the circumstances depends upon whether there was any alternate route given.

380 MR. SHINNICK: I mentioned it only because I thought it goes more strongly against the plaintiff than the defendant.

THE COURT: There is something in there about a little hearsay that he got from the plaintiffs but it is very little.

MR. TAUSIG: Which part are you referring to, Your Honor?

THE COURT: At the bottom of page 130. He says:

"It was there that I found out approximately where she had fallen from both Mr. and Mrs. Bernstein's description of the area."

MR. TAUSIG: Right.

THE COURT: But this other part about the alternate route I think is entitled to come in. He doesn't say what they told him but he does say he found that out from him.

I will just let that stand.

MR. SHINNICK: That has all been admitted then -- page 130 through page 132?

THE COURT: Yes.

MR. TAUSIG: Page 134, starting with the fifth question: "When you characterized . . ." through page 135.

MR. SHINNICK: The same objection here, Your Honor, plus the fact that although there has been some preliminary testimony about where Officer Stevens says the plaintiff fell, there in fact is nothing in the deposition to indicate where it was that he say plaintiff had fallen.

So he is testifying here as to his understanding of where she fell but he is telling us what that understanding was.

MR. TAUSIG: Certainly is telling us what his understanding was from what plaintiffs told him.

MR. SHINNICK: Can you tell me where she fell according to his understanding in the deposition?

THE COURT: You say you want to know where--

MR. SHINNICK: I just want to point out, Your Honor, that what that policeman is testifying to.

THE COURT: Is this your last?

MR. TAUSIG: Just one more, Your Honor.

In answer to Mr. Shinnick's question, if you go back to page 118, Your Honor, Mr. Shinnick said:

"Q. Did Mr. Bernstein have occasion to show you where he alleged his wife fell?

A. No, sir.

Q. Did he tell you, describe to you where he alleged his wife fell?

A. Yes, sir.

Q. If you recall his words, how did he describe it to you, sir?

A. I can't recall his words. Usually in -- well, actually the only way I can answer this question is the usual procedure I go through with people that are new to the area. I've found that there are several landmarks that if you point them out to the tourist, then they can approximately give you the location.

Q. Let me ask the question in this fashion. If you can't recall the words he used to describe it, could you tell us what your impression -- strike that.

Could you tell us from what he said, did you get an idea as to where he was referring to?

A. Yes, sir.

Q. Where was that, sir?

A. An area south of the parking lot. The amount of feet I don't recall exactly, the approximate amount of feet.

However, it was on the south side of the Rionk, which is the building that's south of the parking lot, and as best that I could determine, it was somewhere in this valley that I so described before."

Now, he certainly has told Mr. Shinnick--

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MR. SHINNICK: If he is talking about the same point, Your Honor, when he gets to page 134, then he is not in fact talking about where Mrs. Bernstein said she fell as marked on Plaintiff's Exhibit Number 4.

But again, Your Honor, I don't want to take up too much time with you except to bring it to Your Honor's attention; namely, that the witness's understanding of where the fall occurred and where Mrs. Bernstein said it occurred are different.

MR. TAUSIG: It can't be more than a couple of feet.

MR. SHINNICK: Mr. Loistner said it was fifteen or twenty feet.

THE COURT: At page 135 he said the approximate area where she fell was almost entirely ice.

MR. SHINNICK: That's his estimate of where she fell.

THE COURT: Then he says: "What distance along the sidewalk would that be true," and so forth.

Well, I will let that in, page 134 -- beginning on page 134: "When you characterized the sidewalk . . ." and down through 135.

MR. TAUSIG: The last question, Your Honor, that I want admitted into evidence is on page 138, starting with: "Do you recall . . ." through the last answer on page 139.

THE COURT: Alright, then that may come in.

That's all then, is it?

384 MR. TAUSIG: Yes, Your Honor.

* * *

385 MR. SHINNICK: At the close of the plaintiff's evidence I had made a motion pursuant to Rule 41b for judgment, which Your Honor took under advisement. . .

(Whereupon Mr. Shinnick made an argument on his motion, ending as follows:

MR. SHINNICK: . . . and that the defendant is entitled to judgment. Thank you, Your Honor.

* * *

386 MR. TAUSIG: First of all, with respect to his motion for judgment on behalf of the plaintiff . . .

(Whereupon Mr. Thusig made an argument, Mr. Shinnick made an argument, and Mr. Tausig made final argument.)

THE COURT: I thank both of you for your presentation and for your helpfulness to the court.

I will ask the clerk to make an entry on this jacket that I have taken the case under advisement, including the motion of the defendant.

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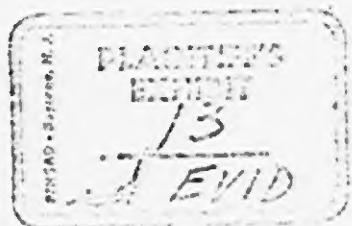


"B"

Personal injury on December 30, 1966, on the walkway leading from the Washington Monument to the public parking lot on 16th Street, NW., Washington, D. C. Accident occurred approximately 30 feet south of the south end of the parking lot. Civil Acting No. 464-67, U.S.D.C. for D. C. Junc Bernstein and Herbert Bernstein vs. United States.

View of walkway looking south from the parking lot showing slope of adjacent lawn area towards the level walkway.

NOTE: Fence erected to protect lawn area in connection with the Cherry Blossom Festival Parade scheduled for April 8, 1967.



A circular, slightly irregular stamp impression. It contains faint, illegible markings that appear to be in a stylized script or seal script. The center of the circle is darker than the outer border.

U. S. DEPARTMENT OF COMMERCE. -- JOHN T. COTTON, Secretary

WASHINGTON, D. C.
NATIONAL AIRPORT
DECEMBER 1966

ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION -- ENVIRONMENTAL DATA SERVICE

- Extreme for the month. May be the last of more than one occurrence

- Below zero temperatures or negative departure from normal.
- T In columns 9, 10, and 11 and in the Hourly Precipitation

TIn columns 9, 10, and 11 and in the Hourly Price table indicates an amount too small to measure.
XNone far — visibility ½ mile or less.

X Heavy fee — within 15 miles or less.

HOURLY PRECIPITATION (Liquid in Inches)

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| 29 | .04 | .03 | .02 | .05 | .03 | .03 | | | | | | | | | | | | | | | | | | .12 | |
| 30 | | | | | | | | | | | | | | | | | | | | | | | | | 28 |
| 31 | | | | | | | | | | | | | | | | | | | | | | | | | 29 |

Data in columns 6, 12, 13, 14, and 15 are based on 8 observations per day at 3-hour intervals. Wind directions are those from which the wind blows. Resultant wind is the vector sum of wind directions and speeds divided by the number of observations. Figures for directions are tens of degrees from true North; i.e., 09 = East, 18 = South, 27 = West, 36 = North, and 00 = Calm. When directions are in tens of degrees in Col. 17, entries in Col. 16 are fastest observed 1-minute speeds. If the / appears in Col. 17, speeds are gusts. Any errors detected will be corrected and changes in summary data will be annotated in the annual Summary if published.

Subscription Price: Local Climatological Data \$1.00 per year including annual Summary if published. Single copy: 10 cents for monthly Summary, 15 cents for annual Summary. Checks or money orders should be made payable and remittances and correspondence should be sent to the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. 20402.

I certify that this is an official publication of the Environmental Science Services Administration, and is compiled from records on file at the National Weather Records Center, Asheville, North Carolina, 28801.

William J. Haggard

Director, National Weather Records Center

| Hour (Local time) | Sky cover in tenths | Sample press. (in.) | AVERAGES BY HOURS | | | | | | | | | | | | Resultant wind Direction deg. Speed Sig. |
|----------------------|---------------------------|------------------------|-------------------|----|----|----|------|----|-----|----|----|----|----|----|---|
| | | | 6 | 12 | 18 | 24 | 30 | 36 | 42 | 48 | 54 | 60 | 66 | 72 | |
| 01 | 6 | 30.06 | 36 | 33 | 71 | 27 | 6.4 | 29 | 3.2 | | | | | | |
| 04 | 6 | 30.07 | 35 | 32 | 73 | 27 | 7.3 | 29 | 3.0 | | | | | | |
| 07 | 6 | 30.08 | 34 | 32 | 72 | 26 | 6.1 | 31 | 3.1 | | | | | | |
| 10 | 6 | 30.11 | 37 | 34 | 67 | 27 | 10.6 | 30 | 3.2 | | | | | | |
| 13 | 7 | 30.06 | 41 | 36 | 59 | 27 | 11.9 | 29 | 4.0 | | | | | | |
| 16 | 7 | 30.04 | 41 | 36 | 59 | 27 | 9.8 | 28 | 3.7 | | | | | | |
| 19 | 7 | 30.07 | 39 | 34 | 64 | 27 | 8.6 | 31 | 3.0 | | | | | | |
| 22 | 6 | 30.07 | 37 | 34 | 68 | 27 | 8.4 | 29 | 3.1 | | | | | | |

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REFERENCE NOTES

CHG ING COLUMNS—
UNL indicates an unlimited
column.
CHG indicates a uniform
cloud ceiling of uniform
height.

| WEATHER COLUMN | |
|----------------|------------------|
| • | Tornado |
| T | Thunderstorm |
| Q | Squall |
| R | Rain |
| RW | Rain showers |
| ZK | Freezing rain |
| L | Drizzle |
| ZL | Frosting drizzle |
| S | Snow |
| SP | Snow pellets |
| IC | Ice crystals |
| SW | Snow showers |
| SG | Snow grain |
| E | Sleet |
| A | Hail |
| AS | Small hail |
| F | Fog |
| IF | Ice fog |
| GF | Ground fog |
| HD | Blowing dust |
| BS | Blowing sand |
| BS | Blowing snow |
| BY | Blowing spray |
| K | Smoke |
| H | Haze |
| D | Dust |

WIND COLUMNS—
Directions are those from which the wind blows, indicated in tens of degrees from true North; i.e., 02 for East, 18 for South, 27 for West. Entry of 06 in the direction column indicates east.

ADDITIONAL DATA

Other observational data contained in records on file can be furnished at cost via microfilm or microfiche copies of the original records. Inquiries as to availability and costs should be addressed to:

Director
National Weather Records Center
Federal Building
Asheville, N. C. 28801

